SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 423

LLOYD M. BENTSEN, SR., ET AL., PETITIONERS,

vs.

EMERY C. BLACKWELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1] [Caption omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION

Civil Action No. 728

EMERY C. BLACKWELL, et al.,

vs.

LLOYD M. BENTSEN, et al.

[fol. 2] COMPLAINT—Filed June 27, 1951

To the Honorable James V. Allred, Judge of said Court:

Now come Emery C. Blackwell, an individual resident of Hidalgo County, Texas, Boyd Construction Company, a private corporation organized under the laws of the State of Texas, with its principal office in Hidalgo County, Texas, Claude E. Blackwell, an individual resident of Tarrant County, Texas, Clyde W. Weatherly, an individual resident of Hunt County, Texas, Arie K. Smith, Dudley Smith, W. H. Ham, and Herbert Clark, all individual residents of Moore County, Texas, hereinafter called Plaintiffs, complaining of Lloyd M. Bentsen, Sr., Elmer C. Bentsen, G. F. Dohrn, Albert L. Richter, R. B. Kale, Earl Pummill, Carl Pummill, C. W. Norton, C. A. Conner, and L. H. Ramey, all individual residents of Hidalgo County, Texas, O. M. Ohmit, an individual resident of Potter County, Texas, Allen Beckham, an individual resident of Hale County, Texas, Pummill Development Company and Pummill Management Company, both private corporations organized under the laws of the State of Texas, with their principal offices in Hidalgo County, Texas, and Bentsen Development Company, a partnership [fol. 3] composed of Lloyd M. Bentsen and Elmer C. Bentsen, doing business in Hidalgo County, Texas, all hereinafter called Defendants, and would respectfully show the Court the following:

I

This action arises under the Securities Act of 1933, May 27, 1933, c. 38, Title I, #48 Stat. 74, as hereinafter more fully appears.

II

The nature of Plaintiffs' complaints against Defendants is that the Defendants, and each of them, entered into a plan and scheme in the nature of a conspiracy to defraud members of the buying public, and particularly these Plaintiffs, by selling securities and/or investment contracts in violation of Sections 77 1. (2) and 77 q of said Securities Act of 1933. The suit is brought as a class suit on behalf of the plaintiffs herein, as well as all other purchasers similarly situated, not parties to the suit. There are common questions of law and fact involved, which by authority of the Federal Rules of Procedure, allow said suit to be filed jointly by these Plaintiffs.

In carrying out said general plan and scheme, the Defendants acquired title to an 800-acre tract of unirrigated land in Hidalgo County, Texas, prepared it to resemble irrigated citrus land, and sold it in small tracts as irrigated citrus land to Plaintiffs and other members of the buying [fol. 4] public residing outside of the Rio Grande Valley of Texas, and unfamiliar with the true facts, at prices far above its actual value, together with a property management or care contract, the whole transaction being treated as an investment by both buyer and seller. Through said care contracts, Defendants continued to extract money from the Plaintiffs under continuing false and fraudulent representations that representations previously made were true, and that the investment was sound and was appreciating in value through such continuing investment and through affirmative acts of concealment of the true facts. The Plaintiffs also allege and will show the Court that such sales of securities and/or investment contracts were made by false and fraudulent representations and by fraudulent concealment of material facts, and that the same representations and concealment were used in connection with the sales to these Plaintiffs and all other members of the class, not parties to the suit.

Each of the Defendants performed his or its part of said plan and scheme, and did execute and perpetrate said fraud upon these Plaintiffs in connection with certain sales of securities and/or investment contracts executed by Pummill

Development Company and Pummill Management Company as sellers and the Plaintiffs as purchasers.

III

(1) That pursuant to said plan and scheme, the Plaintiff [fol. 5] Boyd Construction Company did on February 24, 1950, purchase said securities and/or investment contracts in the form of a 20-acre tract of land planted to young citrus trees and known as the South One-half (½) of the West One-half (½) of Lot Six (6), Block Twenty-six (26), Rio Grande Development Company's Subdivision, Hidalgo County, Texas, agreeing to pay therefor the sum of $400.00 per acre, or the total sum of $8,000.00 in cash, further paying $2,500.00 in cash to have said land planted to young citrus trees. That since the date of said purchase, said Plaintiff has spent the additional sum of $1,944.25 on the care of said trees and/or investment contract, and has had additional expense in investigating said investment and discovering the true facts in the sum of $630.00. That said purchase contract was executed by Carl Pummill, President or Secretary of Pummill Development Company and Paul J. Boyd of Boyd Construction Company on February 24, 1950, and a warranty deed was subsequently issued to Paul J. Boyd Construction Company dated February 24, 1950, and corrected by a deed dated December 4, 1950, to Boyd Construction Company, said deeds now being of record in Vol. 692, page 464, and Vol. 706, page 573, respectively, of the Deed Records of Hidalgo County, Texas. The Pummill Management Company, on February 24, 1950, also executed and delivered to the said Plaintiff a care contract, by which they agreed to care for the property for five years, [fol. 6] with the Plaintiff to continue to invest money in said property through such care, by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such investment was to continue during the five-year period of the contract. The aforesaid deeds and care statements, as well as monthly statements on the investment to be made in the care fund, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said

security the sum of $13,074.25, and has had no return of any kind since the purchase of said security and/or investment contract.

(2) That pursuant to said plan and scheme, the Plaintiff Emery C. Blackwell did on November 23, 1949, purchase said security and/or investment contract in the form of a 40-acre tract of land planted to young citrus trees and known as Lot One (1), Block Thirty-one (31), Rio Grande Development Company's Subdivision, Hidalgo County, Texas, agreeing to pay therefor the sum of $400.00 per acre, or the total sum of $16,000.00, paying down the sum of $4,000.00 in cash and executing five notes for $2,400.00 each due annually thereafter bearing interest at the rate of five (5) per cent per annum, and he paid the further sum of $5,000.00 in cash for said citrus trees. That on January 26, 1950, he purchased Lot Twelve (12), Block Twenty-six (26), [fol. 7] of the same subdivision, containing 40 acres, agreeing to pay therefor the sum of $16,000, trading in as the down payment, property owned by the Plaintiff in Pecos, Texas, described as Lots Twenty-four (24), Twenty-five (25) and Twenty-six (26) of Block Forty-three (43), of the N. P. Subdivision to the Town of Pecos, Reeves County, Texas, for the sum of $6,000, and executing five notes for $2,000.00, each due annually thereafter bearing interest at the rate of five (5) per cent per annum. Said Plaintiff has since such purchase spent the additional sum of $4,177.58 on the care of said trees and/or investment contract, and has paid the additional sum of $3,500.00 on the purchase price of said property and $93.97 as taxes on the property. In addition to this, the Plaintiff has spent approximately $200.00 in investigating the investment and finding out the true facts. Said purchase contracts were executed by Carl Pummill, President of Pummill Development Company, and the Plaintiff, Emery C. Blackwell, on November 23, 1949, and January 26, 1950, respectively, and warranty deeds were delivered to the Plaintiff bearing said dates, now of record in Vol. 655, page 373-375 and Vol. 684, page 193-195 of the Deed Records of Hidalgo County, Texas, respectively. The Pummill Management Company purported to care for said property under the terms of its care agreement, and the deeds and bills for care of said investment were forwarded by the Defendants to the Plaintiff through the United

[fol. 8] States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $22,971.55, and has had no return of any kind since the purchase of said security and/or investment contract.

(3) That pursuant to said plan and scheme, the Plaintiff Claude E. Blackwell did on January 25, 1950, purchase said security and/or investment contract in the form of a 20-acre tract of land planted to young citrus trees and known as the North One-half (½) of Lot Twelve (12), Block Twenty-three (23) of the Rio Grande Development Company's Subdivision, Hidalgo County, Texas, agreeing to pay therefor the sum of $8,000.00, of which amount $2,000.00 was paid in cash and the balance was evidenced by five notes of $1,200.00, each bearing interest at the rate of five (5) per cent per annum, and further paying $2,500.00 in cash for said citrus trees. That since the date of said purchase, the Plaintiff has spent the sum of $1,180.30 on care of said property, $14.18 for taxes, $300.00 interest on said notes, and $230.00 in investigating said investment and discovering the true condition of said property. That said purchase contract was executed by Carl Pummill, President of Pummill Development Company, and Claude E. Blackwell, Plaintiff, on January 25, 1950, and a warranty deed was subsequently issued to the Plaintiff dated January 25, 1950, now of record in Vol. 684, pages 195-197. That on February 15, 1950, the Pummill Management Company executed and [fol. 9] delivered to the said Plaintiff a care contract by which they agreed to care for the property for five years, with the Plaintiff to continue to invest money in said property through such care, by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such investment was to continue during the five-year period of the contract. The aforesaid deeds and care contract, as well as monthly statements on the investment to be made in the care, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $6,232.48, and has had no return of any kind since the purchase of said security and/or investment contract.

(4) That pursuant to said plan and scheme, the Plaintiff Clyde W. Weatherly and Lois Weatherly, husband and

wife, did on January 28, 1950, purchase said security and/or investment contract in the form of a 20-acre tract of land planted to young citrus trees and known as the North One-half (½) of Lot Twelve (12), Block Thirty-one (31) of the Rio Grande Development Company's Subdivision, Hidalgo County, Texas, agreeing to pay therefor the sum of $7,200.00, and paying $2,700.00 in cash on said land, and executing five notes each in the sum of $900.00, each due annually bearing interest at the rate of five (5) per cent per annum, and further paying the sum of $2,500.00 in cash for said citrus trees. That since the date of said purchase, [fol. 10] they have paid the sum of $1,263.76 for care of said property, $14.18 for taxes, $900.00 in payment of Note No. 1, plus interest of $225.00. They have also spent the sum of $200.00 investigating said investment and finding out the true facts concerning same. That said purchase contract was executed by Carl Pummill as President of Pummill Development Company, and the Plaintiff, Clyde W. Weatherly, and wife, Lois Weatherly, and a warranty deed was subsequently issued to Plaintiff and wife, dated January 28, 1950, and recorded in Vol. 655, pages 482-84 of the Deed Records of Hidalgo County, Texas. That on February 15, 1950, the Pummill Management Company executed and delivered to the said Plaintiff a care contract by which they agreed to care for the property for five years, with the Plaintiff to continue to invest money in said property through such care, by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such investment was to continue during the five-year period of the contract. The aforesaid deeds and care contract, as well as monthly statements on the investment to be made in the care, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $7,802.94, and has had no return of any kind since the purchase of said security and/or investment contract.

(5) That pursuant to said plan and scheme, the Plaintiff [fol. 11] Arie K. Smith did, on March 3, 1950, purchase said security and/or investment contract in the form of a 20-acre tract of land planted to young citrus trees and known as the South One-half (½) of the West One-half (½) of Lot Seven

(7), Block Twenty-three (23), of the Rio Grande Development Company's Subdivision, Hidalgo County, Texas, agreeing to pay therefor the sum of $8,000.00, paying $4,000.00 in cash down and executing five notes in the sum of $800.00 each, due annually thereafter, bearing interest at the rate of five (5) per cent per annum, and further paying the sum of $2,500.00 in cash for said citrus trees. That since said purchase, the Plaintiff has paid the sum of $1,537.60 for care for said trees, $14.18 for taxes, and $4,048.00 in advance in cash as the balance of the purchase price plus interest, and an additional $200.00 in investigating the investment and discovering the true facts concerning said investment. That said purchase contract was executed by Carl Pummill as President of Pummill Development Company and the Plaintiff, Arie K. Smith, and a warranty deed to said property was subsequently issued to Plaintiff dated March 3, 1950, now of record in Vol. 694, page 360-62 of the Deed Records of Hidalgo County, Texas. That on April 7, 1950, the Pummill Management Company executed and delivered to the said Plaintiff a care contract by which they agreed to care for the property for five years, with the Plaintiff to continue to invest money in said prop- [fol. 12] erty through such care, by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such investment was to continue during the five-year period of the contract. The aforesaid deeds and care contract, as well as monthly statements on the investment to be made in the care, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $12,299.78, and has had no return of any kind since the purchase of said security and/or investment contract.

(6) That pursuant to said plan and scheme, the Plaintiff Dudley Smith, did on March 3, 1950, purchase said security and/or investment contract in the form of a 20-acre tract of land known as the North One-half (½) of the West One-half (½) of Lot Seven (7), Block Twenty-three (23), Rio Grande Development Company's Subdivision, Hidalgo County, Texas, agreeing to pay therefor the sum of $8,000.00, paying $2,700.00 in cash down and executing

five notes in the sum of $1,060.00, each due annually thereafter bearing interest at the rate of five (5) per cent per annum, and further paying the sum of $2,500.00 in cash for said citrus trees. That since said purchase, the Plaintiff has paid the sum of $1,309.70 for care for said trees, $14.18 for taxes, and $1,325.00 in payment of Note No. 1, plus accrued interest, and an additional $200.00 in investigating [fol. 13] the investment and discovering the true facts concerning said investment. That said purchase contract was executed by Carl Pummill as President of Pummill Development Company, and the Plaintiff, Dudley Smith, and a warranty deed to said property was subsequently issued to Plaintiff dated March 3, 1950, and now of record in the Deed Records of Hidalgo County, Texas. That on April 7, 1950, the Pummill Management Company executed and delivered to the said Plaintiff a care contract by which they agreed to care for the property for five years, with the Plaintiff to continue to invest money in said property through such care, by depositing sufficient sums, from time to time, in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such investment was to continue during the five-year period of the contract. The aforesaid deeds and care contracts, as well as monthly statements on the investment to be made in the care, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $8,048.88, and has had no return of any kind since the purchase of said security and/or investment contract.

(7) That pursuant to said plan and scheme, the Plaintiff W. H. Ham did on March 3, 1950, purchase said security and/or investment contract in the form of a 20-acre tract of land known as the South One-half (½) of the North [fol. 14] One-half (½), and the North One-half (½) of the South One-half (½) of Lot One (1), Block Twenty-three (23) of the Rio Grande Development Company's Subdivision of Lands, Hidalgo County, Texas, agreeing to pay therefor the sum of $8,000.00, paying $4,000.00 in cash down, and executing five notes in the sum of $800.00 each due annually thereafter bearing interest at the rate of five (5) per cent per annum, and further paying the sum of $2,500.00 in cash for said citrus trees. That since said

purchase, the Plaintiff has paid the sum of $1,593.08 for care for said trees, $14.73 for taxes, and $1,100.00 on Note No. 1, plus accrued interest, and an additional $200.00 in investigating the investment and discovering the true facts concerning said investment. That said purchase contract was executed by Carl Pummill as President of Pummill Development Company, and the Plaintiff, W. H. Ham, and a warranty deed to said property was subsequently issued to Plaintiff dated March 3, 1950, and now of record in the Deed Records of Hidalgo County, Texas, in Vol. 703, pages 155-157. That on the 1st day of April, 1950, the Pummill Management Company executed and delivered to the said Plaintiff a care contract by which they agreed to care for the property for five years, with the Plaintiff to continue to invest money in said property through such care, by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such in-[fol. 15] vestment was to continue during the five-year period of the contract. The aforesaid deeds and care contracts, as well as monthly statements on the investment to be made in the care, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $9,407.81, and has had no return of any kind since the purchase of said security and/or investment contract.

(8) That pursuant to said plan and scheme, the Plaintiff Herbert Clark did, on March 3, 1950, purchase said security and/or investment contract in the form of a 20-acre tract of land known as the South One-half (½) of the South One-half (½) of Lot One (1), Block Twenty-three (23), and the North One-half (½) of the North One-half (½) of the West One-half (½) of Lot Six (6), Block Twenty-three (23), Rio Grande Development Company's Subdivision of Lands, Hidalgo County, Texas, agreeing to pay therefor the sum of $8,000.00, which was then paid in cash, and further paying the sum of $2,500.00 in cash for said citrus trees. That since said purchase, the Plaintiff has spent the sum of $1,585.04 for care for said trees, $14.73 for taxes, and an additional $200.00 in investigating the investment and discovering the true facts concerning said investment. That said purchase contract was executed by Carl Pummill as

President of Pummill Development Company, and the Plaintiff, Herbert Clark, and a warranty deed to said property [fol. 16] was subsequently issued to Plaintiff dated March 3, 1950, and now of record in Vol. 701, page 540-42 of the Deed Records of Hidalgo County, Texas. That on the 1st day of April, 1950, the Pummill Management Company executed and delivered to the said Plaintiff a care contract by which they agreed to care for the property for five years, with the Plaintiff to continue to invest money in said property through such care, by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of the Plaintiff and Pummill Management Company. Such investment was to continue during the five-year period of the contract. The aforesaid deed and care contract, as well as monthly statements on the investment to be made in care, were forwarded to the Plaintiff through the United States Mails. That to the date of this suit, Plaintiff has invested in said security the sum of $12,299.77, and has had no return of any kind since the purchase of said security and/or investment contract.

IV

Plaintiffs were induced to sign said investment contract and/or purchase such securities because of their reliance upon fraudulent inducements and false representations of material, existing facts, or fraudulent concealment thereof, which representations and Plaintiffs' reliance thereon were the result of the cumulative effect of the wrongful acts of each and all Defendants in conspiracy, each Defendant performing some indispensable part of the whole plan, which [fol. 17] was designed to and did result in the plundering of Plaintiffs. The representations which were made were as follows, to wit:

1. That by investing in said Citrus Development at this time, Plaintiffs could get in on an 800-acre unit which would be developed by one company in a uniform manner and under the management of citrus experts, for the joint benefit of all investors.

2. That at the end of three years, the property would be paying all of its own expenses.

3. That said investment would produce a minimum of a 20% per year return on the money invested, after five years.

4. That said property was in Water District No. 7, and that while no canals were available on the property at the present time, they would be extended within a maximum of one and one-half years, and that the citrus trees planted before then would be tank watered with water from said district, so there was no reason for delay in planting said trees.

5. That said land was some of the best citrus land in the Rio Grande Valley, and was being sold at the pre-war price of $400.00 per acre, and if not bought now, would not be available at that price.

6. That the land was worth more than $400.00 per acre, and land equally as good could not be bought for that price [fol. 18] anywhere in the Rio Grande Valley.

7. That only the finest citrus stock in the Rio Grande Valley would be used in the planting of said property.

8. That the investor would not have a thing to worry about. The Pummill Management Company would take care of all of the problems which might arise, and the investor would only have to sit back and reap the dividends.

9. That the reason the investor was only getting one-eighth of the customary one-eighth mineral interest was because this was the only interest Pummill Development Company had in said minerals.

10. That good irrigation water was being put on the young citrus trees since bills for water were sent to the Plaintiffs each month prior to their additional investments in care for said trees.

V

That had the representations in Paragraph IV not been made to the Plaintiffs, they would not have made said investment. That said representations were made to the Plaintiffs for the express purpose of inducing Plaintiffs to purchase, that said representations were known to be false and fraudulent by the Defendants at the time they were made, that said representations were of material facts and were false at the time they were made, and the Plaintiffs were damaged by receiving worthless property. That after said oral false and fraudulent representations were

[fol. 19] made to the Plaintiffs, the Defendants forwarded the deeds, contracts and statements to the Plaintiffs through the United States Mails, and continued to make false representations by sending to Plaintiffs, through the United States Mails, various care bills including therein charges for irrigation water which was neither used nor available to the Defendants for such use.

VI

That sometime during the months of February, March and April, 1951, the Plaintiffs jointly discovered that the representations set forth in Paragraph IV were false and fraudulent, and that the true facts concerning their investment were as follows:

1. That Pummill Management Company was not developing said 800 acres in a uniform manner, but was in fact subletting the care to other people, who were neglecting said property. That Pummill Management Company were not experts in the care of citrus, and did not have the necessary equipment to care for the property.

2. That the property was not developing at all, but on the contrary, the trees which were planted were not growing, and a great many of them were dead. That under no circumstances would the property be paying for itself within five years.

3. That said property was not capable of being developed [fol. 20] into bearing citrus groves, and would never pay any return on the investment.

4. That said property was being taken out of Water District No. 7, and that the canals of said district could not be extended to this land, because there was inadequate water from the Rio Grande available for the land in District No. 7 already equipped with canals. Further, that the Defendants could not get suitable water for the irrigation of said trees, but in fact used refuse drain ditch salt water on said trees, which caused most of them to die.

5. That said land was not in fact citrus land, and instead of being worth $400.00 per acre, was only worth about $50.00 per acre as dry farm land.

6. That the citrus stock used for planting said land was

of an inferior quality and would produce only diseased and stunted trees.

7. That Pummill Management Company ceased to care for the property on January 31, 1951, and prior to that time had neglected the property and failed to care for it in a prudent manner.

8. That Pummill Development Company in fact owned twice as much of the minerals in and under said land as it conveyed to the Plaintiffs.

9. That the water used by Pummill Management Company on said trees was refuse drainage ditch salt water [fol. 21] which cost nothing, but that said company had been billing the Plaintiffs for good irrigation water.

That by virtue of the misrepresentations made by the Defendants in the sale of the investment contract and/or security to the Plaintiffs, said Defendants have violated the provisions of Section 77 1. (2) of the Securities Act of 1933 and Section 77 q. of said act, and are jointly and severally liable to the Plaintiffs for return of the money and property expended in their investment, and the Plaintiffs here tender back to the Defendants the investment contracts or securities purchased, together with the land which they now hold under said investment contracts.

VII

Each of the Defendant took part in the sale of said securities and/or investment contracts, either directly or as co-conspirators, agents, employees or by agreement.

1. Lloyd M. Bentsen, Sr., and Elmer C. Bentsen, acting individually and through Bentsen Development Company, a partnership, made available to the other defendants an 800-acre tract of land, which constituted the subject matter of the investment contracts sold under the plan and scheme; such land, with the minerals, would have had an actual value of $40,000.00, but said Lloyd M. and Elmer C. Bentsen reserved the minerals to themselves, thereby reducing the actual value of the land to a figure considerably under $40,000.00, and through the fraudulent artifice of a simulated vendor's lien, over $100,000.00 in excess of such [fol. 22] value, retained both their control over the land and the over-all operations of all defendants under the plan and scheme, while at the same time protecting and securing their interest in the division of the spoils and

plunder to be taken under the scheme; they looked, not to the insolvent Pummill Development Company for payment of said excess and fraudulent value thus impregnated into the whole scheme, but rather to the members of the buying public, to be procured through the activities and efforts of other defendants; they received additional benefits by selling at current prices for good citrus nursery stock cull citrus stock to be planted on said land, and exerted additional control through advancing the funds required for the operation of said selling and care companies.

2. G. F. Dohrn was attorney for the organization of Pummill Development Company and was instrumental as a go between for Lloyd M. Bentsen, Sr., Elmer C. Bentsen and the Pummill Corporations and the other Defendants, and assisted the Bentsens in controlling the operation.

3. Earl Pummill and Carl Pummill were the organizers of Pummill Development Company and the Pummill Management Company, Directors and Stockholders, and each directly made the representations set out in Paragraph IV above.

4. Albert L. Richter is Secretary of Pummill Management Company and as such officer was directly responsible for the continuing misrepresentations concerning care bills [fol. 23] for the property, and was instrumental in keeping the Plaintiffs from discovering the true facts concerning their investment.

5. R. B. Kale, representing himself as a broker, showed the property to Paul Boyd, of Boyd Construction Company, and directly assisted other Defendants in selling said investment contract to the Plaintiff, Boyd Construction Company. He received a commission from the other Defendants for his part in the sale to this Plaintiff.

6. C. W. Norton, as a driver of a sight-seeing tour for Pummill Development Company, made many of the false and fraudulent representations to the Plaintiffs, and was active in inducing the Plaintiffs to purchase said securities and/or investment contracts.

7. C. A. Conner, representing himself as a broker, showed the property to Clyde W. Weatherly and directly assisted other Defendants in selling said investment contract to the Plaintiff, Clyde W. Weatherly, and received a commission therefor.

8. O. M. Ohmit induced the Plaintiffs, Arie K. Smith, Dudley Smith, W. H. Ham and Herbert Clark to make a trip to the Rio Grande Valley, representing himself as a broker for the Pummill Development Company, and assisted the other Defendants in selling said investment contract to these Plaintiffs. He received a commission from the other Defendants for his part in the sale to these Plaintiffs.

9. Allen Beckham, representing himself as a broker, [fol. 24] showed the property to Emery C. Blackwell, and directly assisted other Defendants in selling said investment contract to the Plaintiff Emery C. Blackwell, and received a commission therefor.

All of the Defendants herein are jointly and severally liable to these Plaintiffs for their part in the general plan and scheme, as principals, agents, employees, co-conspirators, or as a result of written or oral agreements between themselves, both as a result of their violation of the Securities Act of 1933 and under the Statutes of the State of Texas, and the Plaintiffs are entitled to return of their purchase money, expended on said securities and/or investment contracts, and in addition thereto are entitled to exemplary damages as a result of the false and fraudulent representations in double the amount of actual damages.

The Plaintiffs would further show the Court that they have agreed to pay the undersigned attorneys the sum of $4,000.00 for bringing this suit, which is a reasonable amount therefor, and an additional sum in the event recovery is had in said suit, such sum to be determined by the final recovery had in said suit.

Wherefore, premises considered, Plaintiffs pray that the Defendants be cited to appear and answer herein, and that on final hearing, Plaintiffs have judgment against each and every Defendant, jointly and severally, for the cancellation [fol. 25] and rescission of said investment contract and/or security purchase, cancellation of the Deeds and Vendor's Lien Notes owed by the Plaintiffs, and for return of all of the money expended in the purchase of said securities and/or investment contracts, in the total sum of $92,137.46, plus exemplary damages in double that amount, for their costs herein expended, for interest on said sums, for reasonable attorney's fees as may be decided upon by the Court,

and for such other and further relief as they may be entitled to receive, either at law or in equity.

That in the alternative, in the event that the Court, on final hearing, should deny the Plaintiffs the remedy of cancellation and rescission based on violations of the Securities Act of 1933, then the Plaintiffs pray for cancellation and rescission of said transaction and return of the monies expended under the laws of the State of Texas, plus interest, costs, attorney's fees, exemplary damages in double the amount of actual damages, and such other and further relief as they may be entitled to receive, either at law or in equity.

That in the alternative, in the event that the Court, on final hearing, should deny the Plaintiffs the remedy of cancellation and rescission, that they be given damages in the sum of $350.00 per acre, being the difference between the value of the land as actually delivered, and the price paid therefor, plus all sums expended for trees and care, and an additional recovery of double that amount as exemplary damages as authorized by Article 4004, Revised [fol. 26] Civil Statutes of Texas, 1925, in the total sum of $353,332.38, plus interest, costs, and attorney's fees, together with such other and further relief as they may be entitled to receive at law or in equity.

Respectfully submitted, Smith, McIlheran & Smith.
By: (S.) E. H. McIlheran, Attorneys for Plaintiffs, Weslaco, Texas.

In United States District Court

Consolidated Motions of Defendants Lloyd M. Bentsen, Sr., et al.—Filed September 7, 1951

To the Honorable Court:

Come now Lloyd M. Bentsen, Sr., Elmer C. Bentsen, and Bentsen Development Company, Defendants in the above entitled and numbered cause, and in response to summons thereon file their Consolidated Motions to dismiss, to strike, and for a more definite statement, pursuant to Rule 12 of

the Federal Rules of Civil Procedure, and respectfully move the Court in the following particulars:

[fol. 27] I. *Motion to Dismiss for Lack of Jurisdiction:*

These Defendants move this Honorable Court to dismiss the Plaintiffs' action as to them because the Court does not have jurisdiction of the subject matter of such action and should take no further cognizance of it other than to dismiss it as to these Defendants, and more specifically, would show to the Court:

(a) The Plaintiffs' petition or complaint alleges that the action arises under the Securities Act of 1933, May 27, 1933, c. 38 Title I, #48 Stat. 74 and more particularly under Sections 77 1.(2) and 77 q. of the said Securities Act of 1933 (Paragraphs I and II of the Plaintiffs' petition) Title 15 U. S. C. A. Section 77 1.(2) and 77 q.; but the complaint does not contain sufficient factual allegations to present a substantial question under the provisions of the cited sections of the Act upon which the Plaintiffs rely. These Defendants submit that if the allegations that certain deeds or monthly statements were forwarded to the Plaintiffs through the United States mails were true (of which these Defendants have no knowledge) the same are not sufficient to constitute an allegation of jurisdictional facts under the cited sections of the Act or to present a Federal question thereunder, in that it is nowhere alleged that such deeds or statements constituted a prospectus or a communication in the sale of securities nor that they were a representation in the sale of the land involved nor that they were made or forwarded through the mails for the purpose of inducing the Plaintiffs to purchase the property. [fol. 28] These Defendants respectfully submit that not only the provisions of said Sections 77 1.(2) and 77 q. but the intendment of the Securities Act of 1933 as a whole, are directed to the regulation of the sale of securities through the mails or in Interstate Commerce and that the gravamen of any action thereunder is that there has been misrepresentation on the part of the Defendants or misleading of the Plaintiffs through the means of instruments specified in the Act and that an allegation of the forwarding of a deed or monthly statement without alleging wherein they were representations or were misleading, is insufficient to

present a Federal question under the Act; and further, that the Plaintiffs' cause of action, if any they have, is simply one for cancellation and recission and that the allegations of it arising under the Securities Act or that certain deeds and statements were forwarded through the mails are calculated to impose upon the jurisdiction of this Honorable Court through broad, general and indefinite conclusions without alleging the necessary jurisdictional facts.

(b) These Defendants submit that this Honorable Court does not have jurisdiction of the Plaintiffs' actions in so far as these Defendants are concerned, regardless of the merits of the action as to the other Defendants. In this connection, these Defendants submit that the Plaintiffs' complaint improperly and prejudicially includes these Defendants with all of the others without making any specific factual allegations to support the Court's jurisdiction under [fol. 29] the Securities Act of the Plaintiffs' action as to these Defendants. The complaint or petition includes vague, indefinite, prejudicial and argumentative allegations which are nowhere explained or supported by specific allegations showing in any way these Defendants' connection with the transactions forming the basis of the Plaintiffs' action or that the facts upon which the Plaintiffs rely to support the jurisdiction of this Court; and if the allegations as to the use of the mails were sufficient to support the Court's jurisdiction as to the other Defendants, the complaint is insufficient to show any connection with the transactions of these Defendants under general rules of pleading as well as under Rule 9(b) of Federal Rules of Civil Procedure.

(c) Further, and in the alternative (as plead in the Plaintiffs' complaint) this Court does not have jurisdiction to hear and determine the Plaintiffs' action for the alternative relief sought in the prayer (pages 16 and 17). It has been submitted hereinabove that the Plaintiffs' allegations of their action arising under the Securities Act do not present a substantial Federal question in support of the jurisdiction of this Court and that their allegations pertaining to the said Act and the use of the mails are calculated to impose upon the jurisdiction of the Court. In the prayer of the Plaintiffs' petition alternative relief

under the laws of the State of Texas is sought and these Defendants submit that this Court does not have juris-
[fol. 30] diction to hear and determine the Plaintiffs' action in connection with such alternative relief. The alternative relief of the said prayer of the petition is the subject of a non-Federal cause of action separate and distinct from that attempted to be brought under the cited provisions of the Securities Act and, regardless of this Court's jurisdiction of the Plaintiffs' action under the Federal statute vel non, it does not have the authority to hear and determine the matters of the alternative relief in that either the lack of jurisdiction or the denial of relief on the basis of the Federal Statute would preclude its hearing or granting alternative relief in the non-federal causes.

II. *Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted:*

Subject to the Court's ruling on the foregoing Motion to Dismiss for Lack of Jurisdiction, these Defendants now move the Court to dismiss the Plaintiffs' action as to them because the complaint fails to state a claim or claims upon which relief against these Defendants could be granted to the Plaintiffs. In this connection, these Defendants submit that in paragraph VII of the complaint the Plaintiffs have sought to join these Defendants through the use of vague, indefinite and argumentative allegations without alleging any specific facts as to these Defendants' connection with the transactions complained of; and the Plaintiffs have alleged that the Defendants' action is in the nature of a conspiracy to defraud members of the buying public with-
[fol. 31] out showing definitely and certainly any connection of these Defendants with the transactions complained of. These Defendants submit that the allegations through which the Plaintiffs seek to join them in the cause of action are mere conclusions unsupported by any factual allegations and are wholly insufficient to state a claim upon which relief against these Defendants could be granted to the Plaintiffs by this Honorable Court.

III. *Motion to Dismiss the Plaintiffs' Class Action:*

Subject to the foregoing motion these Defendants move this Honorable Court to dismiss the Plaintiffs' action as a class action and would show as reasons therefor that the allegations pertaining to this type of action through which the Plaintiffs purport to act for others not parties to the suit on the basis of virtual representation are entirely insufficient to support such an action. In this connection, it is submitted that the Plaintiffs do not allege that it would be impractical to bring all parties similarly situated before the Court; that all such parties are similarly affected in respect to the matters of the suit; nor that the suit is of such a nature that other persons having similar transactions are dissatisfied with their purchases and would desire to complain in the matters of the Plaintiffs' suit. Further, the allegation that there are common questions of law and fact involved is a mere conclusion unsupported by sufficient [fol. 32] allegations and in this connection these Defendants would show that the very nature of the transactions alleged in paragraph III of the complaint made it manifest that distinguishable questions both of law and of fact would probably arise.

IV. *Motion to Dismiss for Misjoinder of Parties:*

Subject to the foregoing, these Defendants now move this Honorable Court to dismiss the Plaintiffs' action because of misjoinder of parties both Plaintiffs and Defendants. The Plaintiffs' complaint makes it manifest that they have been improperly joined in their action against the several Defendants in that each of the transactions alleged in paragraph III of the complaint are matters of individual contracts with the Defendants other than these to each of which the Defendants are entitled to prepare separate defenses, and the joining of which results in the considerable complexities in the trial of the claims and requires the Defendants in effect to meet and defend eight separate actions simultaneously. The joinder of the Defendants in this action is unduly prejudicial and burdensome and the Plaintiffs' actions, if any they have, are separate causes of action based upon the respective contracts and facts in

each case. These Defendants further submit that there has been an improper joinder of Defendants in the Plaintiffs' action in that while the Plaintiffs have named these Defendants in their complaint they have not made allegations sufficient to justify their joinder with the other De-
[fol. 33] fendants; and in this connection the Defendants would show that they have been joined solely on the basis of vague, indefinite and argumentative pleadings but that nowhere are there any specific facts alleged as to these Defendants' connection with the transactions or participation in the alleged conspiracy, and the same is expressly required by Rule 9(b) of the Federal Rules of Civil Procedure.

V. *Motion to Direct Plaintiffs to Amend and File a More Definite Statement*

Subject to the foregoing, these Defendants now move the Court that the Plaintiffs be directed to amend their complaint severing their several causes of action in separate counts in respect to the claims of each of the Plaintiffs and to require the Plaintiffs to file a more definite statement or a Bill of Particulars, setting forth with definiteness and certainty jurisdictional facts and the facts on which they seek to hold these Defendants in their action and, more specifically, these Defendants desire a more definite statement as to the following matters:

(a) The connection of these Defendants with the alleged conspiracy and fraud, the part that the Plaintiffs claim they took in it, and their connection with transactions between the other Defendants and the several Plaintiffs.

(b) The contents of the deeds, contracts, and monthly statements referred to in the complaint and the matters [fol. 34] thereof that constituted a misrepresentation in the sale under the Securities Act of 1933.

(c) The specific deeds, contracts and monthly statements between the Plaintiffs and other Defendants herein, giving the parties, the dates and the facts attending the execution of each.

(d) The connection of these Defendants with the other Defendants (Pummill Development Company) and the specific facts on the basis of which the complaint alleges that

these Defendants had some control over the action of the other Defendants.

(e) The names of the several Defendants who made each and all of the representations alleged in paragraph IV and the places, time and manner in which the representations were made.

(f) The specific manner in which these Defendants "made available to other Defendants" an 800 acre tract of land.

(g) The specific means or manner in which these Defendants "retained both their control over the land and the over-all operations" of the other Defendants.

(h) The specific means or manner through which these Defendants had an interest in "the spoils and plunder to be taken under the scheme".

(i) The specific facts and circumstances constituting the "fraudulent artifice of a simulated vendor's lien".

[fol. 35] (j) The benefits derived by these Defendants (as implied in the complaint) from the transactions between the several Plaintiffs and the other Defendants, and the manner and the time and the nature of such benefits.

(k) The specific circumstances constituting the alleged plan or scheme and facts to support the Plaintiffs' allegation that these Defendants participated in the same.

These Defendants submit that Rule 9(b) of Federal Rules of Civil Procedure requires particularity in all allegations of fraud or conspiracy to defraud and that these Defendants are entitled to have the Plaintiffs plead specific factual allegations as to their joinder in the suit.

Wherefore, these Defendants pray that the Court consider the foregoing motions in the order presented and that said motions be sustained, and that these Defendants go hence with their costs without day.

Kelly, Looney, McLean & Littleton. By (s) Jackson Littleton, Attorneys for Defendants, Lloyd M. Bentsen, Sr., and Elmer C. Bentsen and Bentsen Development Company.

Certificate of service (omitted in printing).

[fol. 36] IN UNITED STATES DISTRICT COURT

CONSOLIDATED MOTIONS OF DEFENDANTS EARL PUMMILL, ET AL.—Filed September 1, 1951

The defendants Earl Pummill, Carl Pummill, Albert L. Richter, C. W. Norton, L. H. Ramey, Pummill Development Company and Pummill Management Company move the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction because it affirmatively appears from plaintiffs' complaint that no Federal question is involved in that the acts complained of did not involve the sale of any security under the Securities Act of 1933.

2. To dismiss the action as a class action because the complaint fails to state a claim or claims properly brought against these defendants as a class action and the complaint should be stricken insofar as it purports to be a representative action.

3. To dismiss the action because the complaint fails to state a claim or claims in behalf of any of the plaintiffs against any of these defendants upon which relief can be granted and more particularly in that:

a. No facts sufficient at law to support a claim under the Securities Act of 1933 are alleged as against any of these [fol. 37] defendants, and

b. No facts sufficient to support actionable fraud at common law are alleged as against any of these defendants, and

c. No facts sufficient to support an action for damages under the Statutes of the State of Texas are alleged as against any of these defendants.

4. To dismiss the action because the complaint has a misjoinder of parties plaintiff and claims because by combining unrelated claims and parties it will make it impossible for these defendants to prepare separate defenses to the commingled claims asserted and will make trial of individual claims unwieldy and prejudical to these defendants.

5. To direct plaintiffs to serve an amended complaint herein stating in separate counts any claims based on the

Securities Act of 1933, the common law and the statutes of Texas and the claims of the various plaintiffs on the ground that each of the plaintiffs' claims are founded on separate transactions and separate statement is essential to the clear presentation of the matters set forth and for the further reason that each plaintiff is endeavoring to assert in a single count three separate and distinct claims.

6. To direct the plaintiffs to file a more definite statement or a bill of particulars of the following matters:

a. The representations or concealments with which each of them is charged by each of the plaintiffs, and

b. The written or oral agreements which plaintiffs allege [fol. 38] on page 15 of the complaint that all defendants had between themselves.

The above matters are not averred with sufficient definiteness or particularity to enable any of these defendants to properly prepare their answers. The glittering generalities and general charges on the part of these plaintiffs in this regard do not comply with Rule 9(b) as to particularity. This is particularly true of defendants Norton, Richter and Ramey.

Respectfully, Hill, Lochridge and King, by (S) Lloyd Lochridge, a member of the Firm; Attorneys for Earl Pummill, Carl Pummill, Albert L. Richter, C. W. Norton, L. H. Ramey, Pummill Development Company and Pummill Management Company, Saxet Building, P. O. Box 32, Mission, Texas.

In United States District Court

Motion of R. B. Kale—Filed September 13, 1951

The defendant R. B. Kale moves the court as follows:

1. This defendant here and now adopts and incorporates by reference herein the consolidated motion of defendants Earl Pummill, Carl Pummill, Albert L. Richter, C. W. Nor- [fol. 39] ton, L. H. Ramey, Pummill Development Company

and Pummill Management Company on file herein and urges the court as said defendants do in said motion.

Respectfully, Hill, Lochridge and King, Box 32, Mission, Texas; by (s) Lloyd P. Lochridge, Jr., a member of the firm, Attorneys for R. B. Kale.

Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION OF G. F. DOHRN—Filed September 19, 1951

Comes now G. F. Dohrn, Defendant in the above entitled and numbered cause, and in response to summons therein files this his Consolidated Motions to dismiss, to strike, and for a more definite statement pursuant to Rule 12 of Federal Rules of Civil Procedure; and in connection with such mo-
[fol. 40] tions would respectfully show to the Court that this Defendant adopts each and all of the motions heretofore filed on behalf of the Defendants, Lloyd M. Bentsen, Sr., and Elmer C. Bentsen, and joins in all of the matters set forth for the Court's consideration in the several motions so filed.

Wherefore, this Defendant prays that the Court consider the several motions filed on behalf of the said Defendants as having been also presented by this Defendant; that each of the said motions be considered in the order presented and that they be in all things sustained and that this Defendant go hence with his costs without day.

(s) G. F. Dohrn.

Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION OF FRANK L. DANNER TO INTERVENE—Filed December 29, 1951

Frank L. Danner moves for leave to intervene as a Plaintiff in this action, in order to assert the claim set forth in his proposed complaint, of which a copy is hereto attached, [fol. 41] on the ground that he is a member of the class constituting the Plaintiffs in said action, or if the Court should find that the complaint does not state a true class action, then that he is entitled to join the other Plaintiffs under the permissive joinder rules, since this Applicant purchased his security and/or investment contract under the same false and fraudulent representations in violation of the Security Act of 1933, May 27, 1933, c. 38, Title I, #48 Stat. 74, as more fully set out in the proposed complaint, and this Applicant's claim presents both questions of law and fact which are common to the main action.

Smith, McIlheran & Smith, by: (S) E. H. McIlheran, Attorneys for Frank L. Danner, 516 Texas Blvd., Weslaco, Texas.

To: Hill, Lochridge & King, Attorneys at Law, Mission, Texas; Kelley, Looney, McLean & Littleton, Attorneys at Law, Edinburg, Texas; Attorneys of Record for the Defendants

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Courts and Post Office Building, Corpus Christi, [fol. 42] Texas, on the 14th day of January, 1952, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Smith, McIlheran & Smith, by: (s) E. H. McIlheran, Attorneys for Frank L. Danner, 516 Texas Blvd., Weslaco, Texas.

We hereby certify that on the 28th day of December, 1951, we served copies of the foregoing Motion and attached Complaint in Intervention upon Hill, Lochridge & King and Kelley, Looney, McLean & Littleton, Attorneys for the Defendants, by depositing said copies in the United States

Mails, postage prepaid, in envelopes addressed respectively to each of said Attorneys at their respective addresses as set out in the foregoing notice, which addresses are the last addresses of the Attorneys known to us.

Smith, McIlheran & Smith, By: (s) E. H. McIlheran, Attorneys for Frank L. Danner, 516 Texas Blvd., Weslaco, Texas.

COMPLAINT IN INTERVENTION

To the Honorable James V. Allred, Judge of Said Court:

Frank L. Danner, an individual resident of Tarrant County, Texas, for his complaint in intervention as a party plaintiff alleges:

I

That on January 24, 1950, intervening plaintiff, Frank L. [fol. 43] Danner purchased a security and/or investment contract in the form of a 40-acre tract of land planted to young citrus trees known as the West one-half (½) of Lot Number Seven (7), Block Number Twenty-six (26), Rio Grande Development Company's Subdivision, Hidalgo County, Texas, under the same false and fraudulent representations set out in said original complaint, paying therefor the sum of $16,000.00 cash, further paying the sum of $5,000.00 to have said land planted to young citrus trees, and subsequent to that date he expended the total sum of $1,155.00 on the care of said trees and/or investment contract, and an additional sum of $200.00 in finding out the true facts concerning his investment.

II

That said intervening planitiff, prior to finding out the true facts concerning his purchase, did on February 21, 1951, sell said security and/or investment contract to Lloyd M. Bentsen, Sr., one of the Defendants, for the sum of $7,000.00, thereby sustaining a loss of $14,355.00.

III

That the above described purchase was evidenced by a contract with Pummill Development Company, executed by

Carl Pummill and dated January 24, 1950, and the above described care payments were made pursuant to a care contract with Pummill Management Company dated February 15, 1950, but executed on January 24, 1950. The pur-
[fol. 44] chase was evidenced by a Warranty Deed from Pummill Development Company dated January 24, 1950 and recorded on March 20, 1950 in Vol. 684, page 188 of the Deed Records of Hidalgo County, Texas.

IV

Intervening plaintiff adopts all of the allegations of the original complaint filed in this suit;

Wherefore, premises considered, intervening plaintiff prays for leave to intervene, and that on final hearing he have the relief allowed under the Securities Act of 1933, or the alternative relief prayed for in said Original Complaint.

Smith, McIlheran & Smith, By: (s) E. H. McIlheran,
Attorneys for Frank L. Danner, 516 Texas, Blvd.,
Weslaco, Texas.

In United States District Court

Order Granting Leave to Intervene—Entered March 21, 1952

3-21-52—Leave to intervene granted.

Clerk notify counsel.

JVA.

[fol. 45] In United States District Court

Affidavit Attached to Brief—Filed October 15, 1951

State of Texas,
County of Hidalgo:

Before me, the undersigned authority, on this day personally appeared Carl Pummill and who, being duly sworn does depose and say:

1. My name is Carl Pummill. I am President of the Pummill Management Company, a defendant in Civil

Cause No. 728 styled Emery C. Blackwell et al. v. Lloyd M. Bentsen, Sr., et al., pending in the United States District Court for the Southern District of Texas, Brownsville Division. This affidavit is made with reference to the motion to the jurisdiction pending in this suit.

2. Each of the plaintiffs Claude E. Blackwell, Clyde W. Weatherly, Arie K. Smith, Dudley Smith, W. H. Ham and Herbert Clark entered into a management contract with Pummill Management Company covering lands described in plaintiffs' complaint on file herein. Paul J. Boyd Construction Company, a Minnesota corporation, entered into a management contract with Pummill Management Company on February 24, 1950. No management contract was entered into with the plaintiff Boyd Construction Company, a Texas corporation. Each such management contract was on a mimeographed form reading as follows:

[fol. 46] Management Contract

STATE OF TEXAS,
County of ——:

The following contract is hereby made and entered into this — day of ——, 1950, by and between ———— ———— of —— County, —— (hereinafter known as First Party) and Pummill Management Company, a corporation, of Mission, Texas (Hereinafter known as Second Party).

Witnesseth:

First Party is the owner of:

containing — acres of grove, more or less, and hereby contracts with the Second Party to supervise the care of the grove located on said premises for a period of not less than one (1) year from the date hereof and to continue thereafter on an annual basis from year to year for a period of five (5) years. However, First Party may terminate this contract by giving written notice to that effect by registered mail at any time during the life of this contract and upon receipt of such notice by Second Party, the contract will terminate thirty (30) days after the mailing of such notice. Second Party may terminate this contract by giving written notice to that effect by registered mail during the month of

January of any year during the life of this contract and upon the mailing of such notice, the contract will terminate [fol. 47] on the first day of February after the mailing of such notice. It is understood, however, that First Party shall not have the right to terminate this contract unless all amounts due Second Party hereunder are paid in full to the date of such termination.

It is hereby agreed that as compensation for the management of the care of said grove, Second Party shall receive One Dollar ($1.00) per acre per month payable in advance, at Mission, Texas. In addition to the above, First Party shall pay promptly as used, the cost of any and all labor and materials used in the normal care of the grove on the basis of the prevailing local charge for doing such work, the cost of all water used in irrigation, the cost of all materials used in dusting and fertilizing and the cost of seed for cover crops and shall pay a reasonable charge for the application of such materials and planting of such cover crop. It is agreed, however, that fertilizer and cover crop will not be used except as directed by owner.

It is agreed that First Party shall pay all these above mentioned costs through the establishment of a fund in the amount of —— Dollars ($—) at —— Bank of ——, Texas. Second Party shall have the authority to write checks on such account for the payment of all work done and all materials used in the care of the grove, and for compensation for supervision due it as herein provided. At the end of each [fol. 48] month, Second Party shall send to First Party a complete accounting of all amounts expended in the care of the grove. Upon receipt of such accounting, First Party shall, within ten (10) days, replenish the said bank account in full to the amount of the original deposit. This deposit shall be withdrawable by First Party ten (10) days after written notice to Second Party that such withdrawal is going to be made.

Since it is necessary that all work in the grove be done when and as needed for the protection of the grove, it is hereby agreed that if First Party shall, at any time during the life of this contract, fail to make such deposits within thirty (30) days of the aforementioned accounting, that such failure will release Second Party from any liability or responsibility to either fruit or grove by not having such

work done when and as needed. It is further agreed that if such default should occur that Second Party shall have the right to cancel and nullify this contract. It is understood that should this contract be nullified in the above mentioned manner that First Party shall be liable for all accrued bills, contract in the working of his land up to and including the termination date of the contract as herein specified.

The term "care" as used herein obligates Second Party to cause to be done all things pertaining to the care of the grove which Second Party believes to be necessary and to the best interest of the grove and of First Party, including [fol. 49] all cultivation of the grove, banking and removing of banks from trees three years old or less when banking is normally deemed avisable, irrigation, dusting, fertilizing, cover crop planting, etc. Second Party is to use his own best judgment as to when and to what extent the above work is to be performed, and shall, in addition, cause any other care work to be performed which the owner may request. Should major pruning be necessary, it will be done when ordered by owner and at an agreed price.

Second Party shall be liable to First Party, his executors, administrators, successors and assigns for any loss, injury or damage sustained on account of his acts or omissions, or that of his agents, amounting to negligence. Second Party does not assume responsibility for loss, injury or damage sustained by fire or any other cause resulting from the negligence of any person other than himself or his agents, nor for storm, wind, extremes of temperature and other acts of God, nor from strikes or other acts of the Public Enemy, lockouts, shortage of labor, fuel, water or materials. Second Party does not assume responsiblity for any material increase in the cost of labor, fuel, materials, or supplies, or any Governmental tax, supervision, regulation, legislation, or any cause beyond the control of Second Party. Any necessary change in either care or charges shall be made after mutual agreement.

It is hereby agreed that it shall be the responsibility of Second Party to see to the harvesting and marketing of all [fol. 50] fruit produced on the above described lands during the life of this contract. Second Party shall use all dili-

gence in such marketing and harvesting and shall see that all crops are removed and processed in due time and season to the best of his judgment and ability. However, First Party shall notify Second Party in writing prior to the marketing of all fruit crops as to the manner in which First Party prefers and directs that such crops shall be marketed and/or whether First Party has entered into any sale marketing agreement or association agreement with a third party or parties for the harvesting, marketing and sale of such crops. Should First Party enter into any such contract or agreement as above mentioned, Second Party shall give full cooperation to such third party in order that all crops may be harvested and marketed to the best advantage and shall, in addition, check and keep a complete accounting of such harvesting and marketing. Second Party shall collect and keep full accounting of all amounts due First Party from fruits and/or crops and shall remit same to First Party at the end of the harvesting season or shall remit any amounts collected during the season if so directed by First Party.

In consideration for the above described services, Second Party shall be entitled to and shall deduct from and retain five (5) per cent from all remittances due First Party at the time such remittance is made to First Party.

All amounts which may become due by First Party to [fol. 51] Second Party in this contract provided for, if not paid when due, shall thereafter bear interest at the rate of six per cent (6%) per annum until paid, and if by reason of default in payment Second Party places the same in the hands of an attorney for collection, First Party will pay an additional amount of ten per cent (10%) on the amount so in default as attorneys fees for collection, and the payment of all such amounts, including interest and attorneys fees, shall be, and is hereby secured by a lien on the land above described, and all net proceeds of the sale thereof or any crops growing or to be grown thereon, and an executed copy of this contract may be filed and registered in the Chattel Mortgage Records of said —— County as a Chattel Mortgage on the fruit crop.

Witness the hands of the parties hereto the day and year first above written.

—— ——, First Party; Pummill Management Company, by —— ——, President.

Attest: —— ——, Secretary.

The State of ————,
County of ————:

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared [fol. 52] —— ——, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the -- day of ——, A. D. 195—.

—— ——, Notary Public in and for —— County, State of ——. (Seal.)

The State of Texas,
County of Hidalgo:

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared —— ——, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act and deed of the said Pummill Management Company, a corporation, and that he executed the same as the act of such corporation for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office this the — day of ————, A. D. 19—.

—— ——, Notary Public in and for Hidalgo County, Texas. (Seal.)

[fol. 53] 3. The plaintiff Emery C. Blackwell made two purchases of land from Pummill Development Company

comprising a total of 80 acres. This land is described in plaintiffs' complaint on file herein. Citrus trees have been planted on his initial 40 acre purchase but no care or management contract has been executed between Emery C. Blackwell and Pummill Management Company on this tract. The second 40 acre purchase was of open land to which no citrus trees have been planted and no care or management contract was ever entered into between Emery C. Blackwell and Pummill Management Company as to this tract of open land.

(S.) Carl Pummill.

State of Texas,
County of Hidalgo:

I have read the foregoing. The facts contained therein are known to me to be true.

(S.) Carl Pummill.

Sworn to and subscribed before me this 13th day of October, 1951. (S.) Scott Martin, Jr., Notary Public, Hidalgo County, Texas. (Seal.)

[fol. 54] In United States District Court

Memorandum Opinion—Filed April 1, 1952

Smith, McIlheran & Smith, Weslaco, Texas, Attorneys for Plaintiff.

Hill, Lochridge & King, Mission, Texas; Kelley, Looney, McLean & Littleton, Sidney L. Farr, Edinburg, Texas, Attorneys for Defendants.

Louis T. Loss, Associate General Counsel; Alexander Cohen, Special Counsel, Securities and Exchange Commission, 425 Second Street, N. W., Washington, D. C., Amicus Curiae.

Memorandum

Eight Texas plaintiffs sue fifteen Texas defendants, claiming the right to maintain this action as a class suit, in

spite of the lack of diversity of citizenship, under the Securities Act of 1933. Plaintiffs allege in substance that:

[fol. 55] Defendants conspired to defraud members of the buying public, and plaintiffs in particular, by selling *securities* and/or investment *contracts* in violation of Sections 77 1(2) and 77q of said Securities Act of 1933;[1] in carrying out the scheme, defendants acquired an 800 acre tract of land in Hidalgo County, Texas, prepared it to resemble irrigated citrus land and sold it, in small tracts, as such to plaintiffs and other members of the buying public residing outside of the Rio Grande Valley and unfamiliar with the true facts at prices far above its actual value, together with a property management or care contracts, *the whole transaction being treated as an investment by both buyer and seller;*

Through the *care contracts*, defendants continued to extract money from plaintiffs under continuing false and fraudulent representations that (the) representations previously made were true and that the investment was sound and was appreciating in value through such continuing investment and through affirmative acts of concealment of the true facts; such sales of *securities* and/or *investment contracts* were made by false and fraudulent representations and concealment of material facts; each defendant performed a part in carrying out the conspiracy and executed and perpetrated the fraud on plaintiffs in connection with certain sales of *securities* and/or *investment contracts* executed by defendants Pummill Development Company and Pummill Management Company as sellers and plaintiffs as purchasers;

Pursuant to the plan and scheme, plaintiffs purchased on various dates ranging from November 23rd, 1949 through March 3rd, 1950, said *securities* and/or *investment contracts in the form of 20 acre tracts* (except plaintiff, Emery C. Blackwell purchased *two 40-acre tracts), described by lot and block numbers in the Rio Grande Development Company's Subdivision in Hidalgo County*, agreeing to pay generally $400 per acre,[2] some in cash and any balance

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[1] Really Sections 12(2) and 17 of the Securities Act, 15 U. S. C. A. 77 1(2) and 77q.

[2] Plaintiff Weatherly agreed to pay $360.00 per acre.

by 5% notes; each generally also paid $2500.00 in cash for each 20 acres to have it planted to young citrus trees and various sums in investigating said investments and discovering the true facts.

The *purchase contract* in each instance was executed by defendant, Carl Pummill, President of defendant, Pummill Development Company (a corporation), and a particular plaintiff; a warranty *deed* subsequently *issued on the same date*[3] and was filed for record; in each instance shortly [fol. 56] thereafter defendant, Pummill Management Company (a corporation) executed and delivered to each plaintiff a *care contract*, agreeing to care for the property for five years, with each plaintiff to continue to invest money in such property *through such care* by depositing sufficient sums from time to time in the First National Bank of Mission, Texas, to the joint account of each particular plaintiff and the management company; *the deeds and care contracts as well as monthly statements on the investment to be made in the care fund were forwarded to each plaintiff through the United States mails;* each plaintiff had invested a stated total amount in said security and had had no return of any kind thereon;

Plaintiffs were induced to sign said *investment contracts* and/or *purchase agreements* because of reliance upon false and fraudulent representations, or fraudulent concealment, resulting from the cumulative effect of the acts of defendants pursuant to the conspiracy, as follows:

By investment in said citrus development, *plaintiffs could get in on an 800 acre unit which would be developed by one company in a uniform manner, under the management of citrus experts, for the joint benefit of all investors;* at the end of three years the property would be paying all of its own expenses; after five years, it would produce a minimum return of 20%; the property was in Water District 7 and, while no canals were then on the property, they would be extended within 18 months; the citrus trees would be tank watered in the meantime; the land was some of the best citrus land in the Rio Grande Valley, was being sold at the

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[3] A correction deed was issued later to plaintiff, Boyd Construction.

pre-war price of $400.00 per acre and, if not bought now, would not be available at that price; it was worth more and land equally as good in the Valley could not be bought for that price; only the finest citrus stock would be used in planting; the investor would not have anything to worry about, the management company would take care of everything and the investor could sit back and reap the dividends; the investor was getting only ⅛ of the customary ⅛th mineral interest because that was all the development company had in the minerals; good citrus water was being put on the trees since bills for water were sent each month prior to their additional *investments in care* for said trees;

After the oral false representations were made, defendants forwarded the *deeds, contracts* and *statements* to plaintiffs through the United States mails and *continued to make false representations by sending plaintiffs through the mails care bills, including charges for* irrigation water which was neither used (by) nor available to defendants for such use.

[fol. 57] Sometime during the months of February, March and April, 1951, plaintiffs jointly discovered that the foregoing representations were false; by virtue of the misrepresentations, defendants violated Sections 77 1(2) and 77q of the Securities Act and were liable to plaintiffs for return of the money and property expended in their investment.[4]

Plaintiffs tender return of the investment contracts or securities and the land. After pleading particular acts

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[4] The Securities and Exchange Commission exphasizes in the Amicus Curiae brief that it makes no independent assertions with respect to the facts alleged by plaintiffs. Its brief is filed on the basis that the allegations in the complaint are admitted as true on motion to dismiss. In five similar cases filed against the same principal defendants here, (in which jurisdiction was grounded on diversity of citizenship), practically the same allegations of conspiracy and fraud were made. After a jury trial lasting nearly four weeks, there were findings of no conspiracy and a hung jury on the issue of fraud by the selling company.

performed by each defendant, "either directly or as co-conspirators, agents, employees or by agreement," plaintiffs pray for cancellation and return of their money, exemplary damages and costs (including attorneys fees). In the alternative, if the court should deny recovery under the Securities Act then for relief under Texas laws.

Defendants move: (1- to dismiss (a) for want of jurisdiction; (b) for failure to state a claim; (2) to dismiss (a) because the action cannot be brought as a class action; (b) for misjoinder of parties, both plaintiffs and defendants; and (3) for more definite statement.

[fol. 58] Defendants' motion to dismiss for want of jurisdiction is based on two propositions which will be discussed as stated.

First: the transactions alleged do not constitute a "security" [5] within the meaning of the act. Many cases are cited and discussed in the briefs—too many to discuss and distinguish here. It is clear that plaintiffs have framed their complaint with an eye to S. E. C. v. W. J. Howey Co. et al., 328 U. S. 293. In the words of counsel for defendant, Pummill: "These residents of Texas, having read some cases and being anxious to secure Federal jurisdiction for trial of land fraud suits have plead in a manner calculated to obtain Federal jurisdiction" Plaintiffs almost succeed in doing this; but, for reasons hereafter set out, I hold they have not.

Pummill has filed an affidavit with his brief, setting out the provisions of the muchly referred to care contracts which were on mimeographed forms. Since these provisions are not disputed, they will be considered as part of the motions to dismiss which, in turn, will be considered [fol. 59] as speaking motions.[6]

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[5] Sec. 2(1) of the Securities Act, 15 U. S. C. A. 77b(1) provides so far as applicable here, as follows: "The term 'security' means any note, stock, . . . investment contract . . . or, in general, any interest or instrument commonly known as a security. . . ."

[6] The care contracts recite and provide:

A named plaintiff is the owner of a described lot of land containing 20 or 40 acres; he contracts with the manage-

[fol. 60] In many respects the facts alleged here are similar to those established in the Howey case; but the *controlling* facts are not the same. ". . . an investment contract for the purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a *common enterprise* and is led to expect profits *solely* from the efforts of the promoter or a third party . . . The test is whether the scheme involves an investment of money in a *common enterprise* with profits to come solely from the efforts of others," S. E. C. v. Howey Co., supra. (Emphasis supplied). That case further says that it must be something more than fee simple interests in land, something different from a farm or orchard coupled with management services.

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ment company to supervise the care of the grove located on his land for one year and to continue from year to year for five years; with the owner being privileged to terminate the arrangement upon 30 days written notice, if all amounts due the care company are paid; the company likewise may terminate on 30 days written notice in January of any year;

The owner pays $1.00 a month per acre in advance for management and the cost of all labor materials, water, seed, etc., (fertilizer and crop cover, not to be used, however, except as directed by the owner); a fund in a stated amount for these costs is to be established in a designated bank, the management to have authority to draw checks thereon for labor, materials and compensation and being required to account for all amounts expended; the owner is to replenish the account within 10 days after each accounting, but has the right to withdraw the deposit upon 10 days written notice; if the owner fails to make such deposits within 30 days of an accounting, the care company is released from all liability and has the right to cancel but the owner remains liable for all amounts due up to the termination date;

The term "care" obligates the management company to do everything it believes to be necessary and to the best interest of the owner, including enumerated acts in the cultivation of the grove and care of the trees; the com-

In the Howey case, Howey kept half of the groves, offering the other half to the public *to finance additional development*. There is no such claim here. Nor is it claimed that prospective investors were told it was not feasible to invest in a grove unless service arrangements were made as in Howey. There is a vast difference in buying narrow, unmarked strips averaging 1.33 acres as in Howey and buying 20 and 40 acre tracts,[7] described by lot and block number, as here.

[fol. 61] The service contract could not be cancelled in Howey; here it can. There the owners had no right of control or possession for 10 years or right of suggestion as to care and cultivation; here they have such rights. All the produce from the entire Howey project was *pooled*, the owners' share of the net profits being determined by the ratio of his minute acreage to the whole. Here the owner is entitled to sell the produce from his 20 or 40 acres to others if he so desires. His profits are not dependent on the yield from or cost of producing or marketing the produce from any other tract.

While plaintiffs have alleged that it was represented to them that they were getting in on an 800 acre unit to be developed under one management for the benefit of all the

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pany is to use its own best judgment and, in addition, do any other care work requested by the owner;

The company is to be liable for its own negligence but not for the acts of God, shortage of water or materials, etc.; any necessary change in care or charges to be made after mutual agreement; the company is to be responsible for harvesting and marketing of all fruit produced and will use due diligence in that respect; but the owner must notify the company in writing, prior to marketing, as to his preference in that respect and whether he has made a sales agreement with others; in the latter event, the company is to give full co-operation and keep a complete account of such harvesting and marketing and remit to the owner, less 5%;

All amounts due by the owner to bear interest at 5%, attorneys fees and a crop lien being provided for.

[7] A large "ranch" in California, a good sized citrus farm in the Rio Grande Valley.

investors, there is no suggestion in the care contracts of joint development, operation or relation to any other acreage. The allegations are that a purchase agreement was executed and a warranty deed issued *on the same date and filed for record.*[8]

Plaintiffs' allegations, in the light of the actual terms of the care contracts, fall far short of showing an investment in a common enterprise. This is, in reality, a number of actions, combined in one, for alleged fraud in the sale of lands; and, perhaps, for breach of contract for orchard [fol. 62] management. I do not believe that the Securities Act was designed to reach the transactions here revealed.

Defendants' first point will be sustained.

Second: Defendants contend that even though the transactions alleged constitute investment contracts, or securities, they do not come within the prohibitions of Sections 12(2) of the Securities Act since the only allegations as to use of the mails is that the deeds, care contracts and monthly statements on the care contracts were mailed to plaintiffs after alleged oral misrepresentations and concealments, and after consummation of the sale.

Section 12(2), 15 U. S. C. A. 77, 1(2), creating a civil remedy in behalf of purchasers of securities, reads, so far as applicable here, as follows:

> "Any person who . . . (2) sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could

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[8] The date of filing of recording is not given. This may be significant and may explain the allegation as to the *deed* being sent to each plaintiff by mail after consummation of the purchase, since it is prudent, that a deed should be recorded promptly by the purchaser or some one for him.

not have known, of such untruth or omission, shall be liable to the person purchasing such security from him. . . ."[9]

[fol. 63] Defendants contend that it is not enough that the contracts, deeds and monthly statements were mailed to plaintiffs after oral communication; that, in addition, a prospectus must have been transmitted by mail or by means of interstate transportation or communication (since obviously an oral communication cannot be transmitted by mail, although it could by interstate radio or telephone). Plaintiffs, on the other hand, joined by amicus curiae, contend that it is sufficient if there be oral misrepresentations and the mails are used in any manner in connection with the sale or in delivering the deeds, care contracts or monthly statements—just as though a civil remedy had been created by Section 12(2) for victims of a scheme to defraud in the sale of a security where the mails are used in any manner in its execution as under the mail fraud statute[10] or the criminal provisions of Section 17 of the Securities Act.

There is authority for both views[11] but no decision in this circuit. No useful purpose would be served by detailed discussion on my part.

[fol. 64] Kemper v. Lohnes, 7th Cir., 173 F. (2d) 44, summarizes my problem and best represents my views. It discusses the cases relied upon by plaintiffs. In spite of the criticism leveled at the decision by amicus curiae, it seems

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[9] Jurisdiction is conferred by Sec. 22(a); 15 U. S. C. A. 77V.

[10] 18 U. S. C. A. 1341.

[11] Defendants rely on: Kemper v. Lohnes, 7th Cir., 173 F. (2d) 44; Independent Sharps Corp. v. Deckert, 3rd Cir., 108 F. (2d) 51; Murphy v. Cady (D. C. Me.) 30 F. Supp. 466, 469; Cross v. Independence Shares Corp., (D. C. Penn.) 36 F. Supp. 541.

Plaintiffs rely on: Schiller v. H. Vaughan Clarke & Co., 2nd Cir., 134 F. (2d) 875; Moore v. Gorman (D. C. N. Y.) 75 F. Supp. 453.

Comments in various law reviews and articles supporting both views have been cited by amicus curiae.

to me to be well reasoned. I content myself therefore by quoting from it as follows:

> "The cases reveal that a number of courts have been confronted, as we are, with interpreting the rather confusing phraseology which Congress has employed and, as might be expected, have reached different results. We do not regard any of the cases which we have read as particularly helpful and it seems to be one of those instances where each court confronted with the problem must make its own appraisement of the statutory language.
>
> (1) The phraseology of the section as applied to the pertinent allegations of the complaint may be reduced to read that any person who 'sells a security . . . by the use . . . of the mails, by means of . . . oral communication . . .' This must be so because it is not claimed that 'any means or instruments of transportation or communication in interstate commerce' was used other than that of the mails, nor is it claimed that there was any untrue statement 'by means of a prospectus.' The untrue statement, as alleged, was by means of an 'oral communication.' Of course, it is evident that an untrue statement made by 'oral communication' cannot take place through the mails, which we think indicates that the section does not contemplate the inclusion of an 'oral communication' in connection with 'use of the mails.' "
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> [fol. 65] "(2) Now to approach the matter from another angle. Assuming that an 'untrue statement' is the gravamen of the cause, as we think it is and as was stated in Pennsylvania Co., etc. v. Deckert et al., 3 Cir., 123 F. 2d, 879, 984, such untrue statement must be made either (1) 'by means of a prospectus' or (2) by 'oral communication,' and in turn these two means of imparting an untrue statement must be made (1) 'by the use of any means or instruments of transportation or communication in interstate commerce' or (2) 'by the use . . . of the mails.' It appears to us, in fact we think it unreasonable to think otherwise, that 'by the use . . . of the mails' was employed solely in connection with 'by means of a prospectus', as the

latter term is defined in the Act. Sec. 77b (10) states: 'The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio . . .' Thus the matters included in this definition are written and such as are commonly sent through the mails. An oral communication cannot be sent through the mails, and it is unrealistic to associate such a communication with the use of the mails.

"Of course, the phrase 'oral communication' must be recognized and given a place in construing the section, but that may be done by associating the term with a means of 'communication in interstate commerce'. Sec. 77b(7) states: 'The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States . . .' This certainly would include telephone conversations as means of communication in interstate commerce and perhaps broadcasts by radio, and these [fol. 66] two means of 'oral communication' alone might well include a large segment of the communications in interstate commerce which Congress intended to reach.

"The case most strongly relied upon by plaintiff, which admittedly furnishes support for her contention, is Schillner et al. v. H. Vaughan Clarke & Co. et al., 2 Cir., 134 F. 2nd 875. In that case the misrepresentations were oral and were made by a Philadelphia stock broker in conversation with the buyers, in Rome, New York. Liability was held to exist under Sec. 12(2), since the stock certificates were delivered by mail from defendant's Philadelphia office to the plaintiffs in Rome, New York. That case is distinguishable in that there, while the untrue statements which resulted in the sale were made by oral communication, the sale was not actually consummated until the certificates were delivered, and delivery was made by mail, while in the instant situation the most that can be said for the use of the mail is that the parties exchanged letters which resulted weeks later in a meeting where the untrue

statements were made. This distinction in the facts, it may be admitted, does not distinguish the reasoning which the court there employed. The court, however, conceded, 134 F. 2d page 877, that its construction of the statute was not in accord with the weight of judicial authority (citing cases which had held to the contrary). Our construction of the statute compels us, also, to take issue with the result reached in that case.

[fol. 67] "(3) In our judgment, the alleged misrepresentations which were made by means of 'oral communication' were not made 'by the use . . . of the mails' and, therefore, no cause of action was stated."

In addition it is to be noted that Section 12(1) creates the same civil remedy against any person who "sells a security in violation of Section 5" (15 U. S. C. A. 77e). Section 5 makes it unlawful, unless a registration statement is in effect, among other things, "to cause . . . to be carried through the mails . . . any such security for the purpose of sale or for *delivery after sale.*" Whatever the reasons, it thus appears that Congress has specifically provided in actions under Sections 12(1) and 5 that it is unlawful to *deliver* the security through the mails and significantly, has failed to so provide in actions under Section 12(2). There are other differences between the language employed in Section 12(2) and in Section 17 and other sections which to my mind distinguish the many criminal cases upholding almost any incidental use of the mails in connection with a sale or in furtherance of a fraudulent scheme.

Defendant's second jurisdictional point also will be sustained.

In view of this disposition it is unnecessary to discuss the remaining questions raised by defendants. Since all plaintiffs and all defendants are resident citizens of Texas, the Court has no power to grant plaintiffs' alternate prayer for relief under Texas laws.

[fol. 68] I regret that the pressure of constant trial work for the past three months has prevented detailed discussion of the many cases and points advanced in the briefs. I desire, however, to express particular appreciation for the able and exhaustive brief filed by amicus curiae.

The Clerk will notify defendants' counsel to submit an order in accordance with this memorandum.

(S.) James V. Allred, Judge.

Corpus Christi, Texas,

March 31st, 1952.

[fol. 69] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL FOR LACK OF JURISDICTION—Entered April 10, 1952

Be it remembered that in the above entitled and numbered cause on the 31st day of March, 1952, the Court rendered its judgment on the consolidated motions theretofore timely filed and properly presented by the Defendants through their attorneys of record, the said consolidated motions consisting of those filed respectively for the several defendants and including consolidated motions of Defendants Lloyd M. Bentsen, Sr., Elmer C. Bentsen, and Bentsen Development Company filed by their attorneys of record, Kelley, Looney, McLean & Littleton of Edinburg, Texas, consolidated motions of Defendants Earl Pummill, Carl Pummill, Albert L. Richter, C. W. Norton, L. H. Ramey, R. B. Kale, Pummill Development Company and Pummill Management Company filed by their attorneys of record, Hill, Lochridge & King of Mission, Texas, and consolidated motions of the Defendant G. F. Dohrn through adoption of the consolidated motions of the other defendants and filed by himself, and presented to the Court Motions (1) to dismiss for want of jurisdiction, (2) to dismiss for failure to state a claim upon which relief could be granted, (3) to dismiss because the action could not be brought as a class action, (4) to dismiss for misjoinder of parties Plaintiffs [fol. 70] and Defendants, and (5) alternative motion for a more definite statement; and the motions having been timely placed upon the motion docket and properly submitted to the Court, and the parties having filed their respective and several briefs on the said motions, and there having been filed an Amicus Curiae brief on behalf of the Securities and Exchange Commission after leave granted

by the Court; and the Court having considered the said motions, the briefs and all matters filed in support of or in opposition thereto by the respective parties, was of the opinion that the Defendants' Motion to Dismiss for Lack of Jurisdiction was well taken and should be sustained; and the Court was of the further opinion that having decided to sustain the Defendants' Motion to Dismiss for Lack of Jurisdiction, it is unnecessary to enter any order on the several other matters filed by the Defendants, and the Court being of the opinion that the said cause should in all things be dismissed for want of jurisdiction;

It is, therefore accordingly, ordered, adjudged and decreed by the Court that the said entitled and numbered cause wherein Emery C. Blackwell, Boyd Construction Company, Claude E. Blackwell, Clyde W. Weatherly, Arie K. Smith, Dudley Smith, W. H. Ham, Herbert Clark, and Frank L. Danner are the Plaintiffs, and Lloyd M. Bentsen, Sr., Elmer C. Bentsen, G. F. Dohrn, Albert L. Richter, R. B. Kale, Earl Pummill, Carl Pummill, C. W. Norton, C. A. [fol. 71] Connor, L. H. Ramey, Allen Beckham, Pummill Development Company and Pummill Management Company are the Defendants, shall be, and the same is hereby, in all things dismissed for lack of jurisdiction; and the costs of said cause are assessed against the Plaintiffs for which the Officers of the Court may have their execution.

Entered this 10 day of April, 1952.

(S.) James V. Allred, Judge, U. S. District Court, Southern District of Texas, Brownsville Division.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 8, 1952

Notice is hereby given that Emery C. Blackwell, Boyd Construction Company, Claude E. Blackwell, Clyde W. Weatherly, Arie K. Smith, Dudley Smith, W. H. Ham, Herbert Clark and Frank Danner, plaintiffs in the above entitled and numbered cause, hereby appeal to the United States Circuit Court of Appeals for the 5th Circuit, from the

Final Order of Dismissal for Lack of Jurisdiction, entered [fols. 72-76] in this action on April 10, 1952.

Smith, McIlheran & Smith, By (S.) E. H. McIlheran, Attorneys for the Plaintiffs-Appellants, 516 Texas Boulevard, Weslaco, Texas.

Bond on appeal for $250.00 filed May 8, 1952, omitted in printing.

[fol. 77] In the United States District Court

Stipulation Designating Parts of Record to Be Presented —Filed May 13, 1952

It is hereby stipulated that the following shall comprise the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the 5th Circuit:

1. Complaint (erroneously designated Plaintiffs' Original Petition).
2. Consolidated Motions of Defendants Lloyd M. Bentsen, Sr., Elmer C. Bentsen and Bentsen Development Company.
3. Consolidated Motion of Defendant Earl Pummill, Carl Pummill, Albert L. Richter, C. W. Norton, L. H. Ramey, Pummill Development Company and Pummill Management Company.
4. Motion of R. B. Kale.
5. Motion of G. F. Dohrn.
6. Motion of Frank L. Danner to Intervene as Plaintiff.
7. Order granting Frank L. Danner leave to intervene.
8. Affidavit attached to brief of Earl Pummill, et al, [fol. 78] treated by District Court as Speaking Motion.
9. Memorandum Opinion.
10. Order of Dismissal for Lack of Jurisdiction.

It is further stipulated that the above record may be printed by the Appellants prior to its transmission to the United States Circuit Court of Appeals for the 5th Circuit.

Dated this 30th day of April, 1952.

Smith, McIlheran & Smith, By (S) E. H. McIlheran, Attorneys for the Plaintiffs, Weslaco, Texas, Hill, Lochridge & King, By (S) L. P. Lochridge, Jr., Attorneys for the Defendants, Earl Pummill, Carl Pummill, Albert L. Richter, C. W. Norton, L. H. Ramey, R. B. Kale, Pummill Development Company and Pummill Management Company, Mission, Texas, Kelley, Looney, McLean & Littleton, By (S) Jackson Littleton, Attorneys for the Defendants, Lloyd M. Bentsen, Sr., Elmer C. Bentsen, Bentsen Development Company and G. F. Dohrn.

[fol. 79] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 80] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARGUMENT AND SUBMISSION—November 27, 1952.

(Omitted in printing)

[fol. 81] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14127

EMERY C. BLACKWELL, et al., Appellants,

versus

LLOYD M. BENTSEN, SR., et al., Appellees

Appeal from the United States District Court for the Southern District of Texas

April 27, 1953

Before Holmes, Russell and Strum, Circuit Judges

OPINION OF THE COURT—Filed April 27, 1953

STRUM, Circuit Judge:

The basic question presented by this appeal is whether or not the district court erred in dismissing the complaint for lack of federal jurisdiction. This in turn involves two constituent questions: (1) Do the transactions described in the complaint constitute "investment contracts" as contemplated by sec. 2(1) of the Securities Act of 1933, 15 U. S. C. A. 77(b)(1); and (2) Does the use of the mails in [fol. 82] consummating these transactions entitle plaintiffs to relief under sec. 12(2) of said Act, 15 U. S. C. A. 77*l*(2). The district judge answered both these questions negatively.

There is no diversity of citizenship. Federal jurisdiction depends entirely upon alleged violations of the Securities Act of 1933.

In substance, the complaint alleges that during the latter part of 1949 and early 1950, each of the 9 appellants, plaintiffs below, purchased lands, usually in units of 20 acres, from Pummill Development Company, one of the defendants below, for the purpose of developing the same into small citrus groves. These small tracts were parts of an 800 acre tract owned by the Development Company, and said to be suitable for citrus cultivation.

Concurrently with, or shortly after, executing the land purchase contract with Pummell Development Company,

the purchaser also executed a care and management contract with Pummill Management Company, under which the latter agreed to plant young citrus trees on the land, cultivate and develop the grove, harvest and market the crops, and remit the proceeds to the owner, after deducting 5% of the proceeds as compensation for harvesting and marketing services. A separate consideration was paid for planting the trees. While the Management Company undertook full responsibility for harvesting and marketing the crops in the absence of directions from the owner, the management contract contained provisions for an investor to give directions as to the marketing of the crop on his tracts, in which event the Management Company would [fol. 83] follow these directions but would apparently still supervise the harvesting and marketing and would still receive its compensation therefor.

The defendants Earl and Carl Pummill were the organizers of the two Pummill companies, and are directors and stockholders therein. The purchase contract for the land, and the accompanying management contract, were in each instance executed by Carl Pummill, who was president of both companies. The management contracts usually covered a period of one year, with the option to renew annually up to five years.

Appellants, and most of the other purchasers, were inexperienced in citrus culture and resided outside the Rio Grande Valley of Texas in which these lands were located. Prospective purchasers were induced by salesmen of the vendors to visit the vicinity of the lands where they were entertained by the vendors, and taken on a tour of the lower Rio Grande Valley. They were told by the vendors that "by investing in this citrus development * * * they could get in on an 800 acre unit which would be developed by one company in a uniform manner, and under the management of citrus experts, for the joint benefit of all investors," and that "they would not have a thing to worry about; that the Management Company would take care of all problems which might arise, and the investor would only have to sit back and reap the dividends." It was further represented that the property would be paying all of its expenses in 3 years, and that the investment would produce a minimum return of 20% per annum after 5 years.

[fol. 84] Investors would usually buy one or more 20 acre tracts on one of these visits, and a deed or contract therefor, and the management contract to accompany the same, would be later mailed to the purchasers at their homes. Plaintiffs allege that they were induced to purchase these lands, and enter into management contracts, by fraudulent misrepresentations and concealment of material facts concerning the character, quality and value of the land sold, and in other respects.

With the two possible exceptions hereinafter mentioned, these are in principle the same type of purchase-management contracts which have been held by the Supreme Court to be "investment contracts" within the meaning of sec. 2(1) of the Securities Act of 1933. *Securities & Exch. Comm. v. W. J. Howey Co.*, 328 U. S. 293, 90 L. Ed. 1244; *Securities & Exch. Comm. v. C. M. Joiner Leasing Corp.*, 320 U. S. 344, 88 L. Ed. 88. See also *Securities & Exch. Comm. v. Bailey*, 41 Fed. Supp. 647, decided prior to the *Joiner* and *Howey* cases.[1] In the *Howey* case, *supra*, the court held that in using the term "investment contract" in the Securities Act, Congress employed a term the meaning of which had been crystallized by prior judicial interpretations, and that the term covered contracts of the type here [fol. 85] involved. We notice minor and non-determinative differences between the facts of this case and those in the

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[1] Note. Many other courts have taken the same view. Amongst the decisions are: Securities & Exchange Comm. v. Tung Corp. of America, 32 Fed. Supp. 371; Kerst v. Nelson, 213 N. W. 904, 54 A. L. R. 495; State v. Evans, 191 N. W. 425, 27 A. L. R. 1165; State v. Gopher Tire Co., 177 N. W. 937; State v. Agey, 88 S. E. 726; Webster v. United States I. Realty Co., 212 N. W. 806; Prohaska v. Hemmer-Miller Co., 256 Ill. App. 331; In re: Waldstein, 291 N. Y. S. 697; Note, 87 A. L. R. 82. Securities & Exch. Comm. v. Crude Oil Corp., 7 Cir., 93 Fed. (2) 844; Securities & Exch. Comm. v. Payne, 35 Fed. Supp. 873; Securities & Exch. Comm. v. Universal Service Ass'n., 7 Cir., 106 Fed. (2) 232; Securities & Exch. Comm. v. Wickham, 12 Fed. Supp. 245; Gracchi v. Friedlander, 270 P. 235. Cf. contra, State v. Hamphill, 142 Fla. 728, 195 So. 915.

Howey and *Joiner* cases, but the determinative factors are in principle the same.

Here, as in the *Howey* and *Bailey* cases, *supra*, the sales and management contracts, though separate in form and execution, are closely allied in performance, as well as in personnel. They form constituent parts of what is essentially one transaction. In essence, what the defendants are really offering, and certainly what the average purchaser is really buying is, not land for its intrinsic value as such, but a producing orange grove as a source of income, without which they would not be interested in purchasing the land. Purchase of the land is merely the conduit through which the investment is accomplished. Instead of a stock certificate evidencing a share in a common ownership of capital assets, these purchasers receive a deed evidencing an ownership in severalty. But the paramount emphasis is upon the income to accrue, which is the chief, if not the sole, attraction to the purchaser. Based upon the defendants' representations, the purchaser's expectation is that for a sum of money invested in a small tract of land which the purchaser places in the hands of the defendants for cultivation along with many similar and contiguous tracts owned by others, he will ultimately receive an income from the yield produced by defendants' developing and managing activities. This is not an ordinary purchase of land as such. It is an investment for the purpose of producing an income through the activities of others than the owner. Consequently the transactions constitute "investment contracts" within the meaning of that term as defined in the *Howey* case, and other cases, *supra*.

[fol. 86] It is significant that few, if any, of these small tracts are purchased by citrus farmers who wish to cultivate them as a personal farming enterprise. The overwhelming percentage of purchases are by persons who are inexperienced in citrus cultivation, who live at a great distance from the lands, and who apparently have no intention of occupying the land or cultivating it by their own efforts, but who are attracted thereto solely by the income to be derived through cultivation of the land by the Management Company.

There is a dispute of fact as to whether two of the purchasers here involved entered into management contracts.

If they merely purchased land, without more, such a purchase would not constitute an investment contract within the meaning of the Securities Act. In view of the dispute on this point, we leave that question open for decision on the facts as they develop at the trial. As to all those, however, who executed care and management contracts in connection with their contract of purchase, we hold on the authority of the cases above cited, that the transactions constitute "investment contracts" within the meaning of sec. 2(1) of the Securities Act of 1933. At least as to these, the complaint should not have been dismissed.

Though the mails are not alleged to have been used for the purpose of sending out prospectuses or advertising these lands for sale, all deeds and management contracts by which the transactions were consummated were returned by the vendors to the purchasers through the mails. We are aware of the conflict in the authorities on the subject, but in our opinion this is a sufficient use of the mails to [fol. 87] bring the case within sec. 12(2) of the Act. This is a remedial statute. It should be liberally construed to accomplish the dominant legislative purpose in adopting it, which is to prevent the use of the mails, and other instrumentalities of interstate commerce, in the perpetration of investment frauds. Sec. 12 of the Act, so far as here material, provides: "Any person who * * * sells a security * * * by the use of * * * the mails, by means of a prospectus *or oral communication*, (Italics supplied) which includes an untrue statement of a material fact * * * shall be liable to the person purchasing the security from him * * *." Here the sales were apparently by oral communication, but the transactions were consummated by the use of the mails, which in our opinion brings the transaction within the statute. Delivery of the deeds and contracts is an integral part of the sale. *Schillner v. H. Vaughan Clarke & Co.*, 2 Cir., 134 Fed. (2) 875, 165 A. L. R. 1232 (note); *Moore v. Gorman*, 75 Fed. Supp. 453. Compare, *contra*, *Kemper v. Lohnes*, 7 Cir., 173 Fed. (2) 44, which was followed by the district court.

Since at least some, if not all, of these transactions are within the purview of the Securities Act, federal jurisdiction exists and the complaint should have been retained.

Reversed and remanded.

[fol. 88] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14127

EMERY C. BLACKWELL, et al.,

versus

LLOYD M. BENTSEN, SR., et al.

JUDGMENT—April 27, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Lloyd M. Bentsen, Sr., and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 89-98] Petitions for rehearing covering 10 pages filed May 16, 1953 omitted from this print. They were denied, and nothing more by order July 27, 1953.

[fol. 99] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—July 27, 1953

It is ordered by the Court that the Petitions for Rehearing filed in this cause be, and the same are hereby, denied.

[fols. 100-101] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 423

LLOYD M. BENTSEN, SR., et al., Petitioners,

vs.

EMERY C. BLACKWELL, et al.

ORDER ALLOWING CERTIORARI—Filed December 7, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
OCT 21 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 423

LLOYD M. BENTSEN, SR., *et al.*,
Petitioners,

v.

EMERY C. BLACKWELL, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October, 1953.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1953

No.

LLOYD M. BENTSEN, SR., *et al.*,
Petitioners,

v.

EMERY C. BLACKWELL, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now the petitioners, Lloyd M. Bentsen, Sr., Elmer C. Bentsen and Bentsen Development Company, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 27, 1953.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 54-68) and the opinion of the Court of Appeals (R. 81-87) are both unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1953 (R. 88). Petitions for rehearing were denied on July 27, 1953 (R. 99). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

This is a local land dispute in which purchasers of citrus land in the Rio Grande Valley of Texas seek to invoke federal jurisdiction by pleading § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2). Does this Section apply to a purely intrastate transaction where the sale is completed without the use of the mails or interstate commerce, but some time thereafter the executed documents evidencing the completed transaction are forwarded by mail to the purchasers?

STATUTE INVOLVED

Section 12(2) of the Securities Act of 1933, as amended, 15 U. S. C. § 77*l*(2) reads as follows:

"Any person who—

* * *

> sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Section 22(a) of the Act, 15 U. S. C. § 77v(a) provides that the district courts shall have jurisdiction

> "concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title".

The full text of 22(a) and Section 2(1) of the Act defining "security" are to be found in the Appendix to this brief, *infra*, page 14.

STATEMENT

a. The Complaint

The present action was filed in the United States District Court for the Southern District of Texas by eight plaintiffs, residents of the State of Texas,[1] against your three petitioners, residents of the State of Texas, and twelve other residents of the same State (R. 2-3). The controversy relates to the sale of certain citrus land located in Hidalgo County, Texas, in the Rio Grande Valley. The facts are as follows:

The eight plaintiffs purchased the land in question from certain of the defendants in 20 and 40 acre lots, and paid for citrus trees planted or to be planted on their tracts. Most of the purchasers also entered into contracts with one of the defendant companies which agreed to take care of the trees in question for a specified fee and the cost of labor and material expended (R. 5-6, 8-9, 10, 11-12, 13, 14, 16).

The complaint alleged that the land in question was part of a block of 800 acres offered to persons resident "outside of the Rio Grande Valley of Texas", "together with a property management or care contract, the whole transaction being treated as an investment by both buyer and seller." (R. 4). It was then alleged that the transactions were induced by false representations of some of the in-

[1] One other Texas resident intervened as plaintiff (R. 44).

dividual defendants (R. 22, Par. VII, 3), and that the other defendants in various manners aided the said defendants (R. 21, *et seq.*, Par. VII).[2]

Plaintiffs alleged that the sale of the land coupled with the agreement to care for the land made the entire transaction the sale of an investment contract and therefore of a security under the Securities Act (R. 3-4). The decision of this Court in *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U. S. 293, was relied on (R. 58).

The use of the mails was alleged in the following manner:

The purchase of the land was in each case made on a personal visit of the purchaser to the property in Hidalgo County, Texas,[3] and payment was made at the time. In some cases the payment was all in cash (R. 5, 15, 43) and in others by cash and notes (R. 8, 9, 11, 12, 14).[4] Deeds to the land were executed the same day and recorded in the purchaser's name (R. 8, 9, 11, 12-13, 13-14, 15-16).

On the occasion of this visit the plaintiffs purchased the land. Either the same day or later, one of the defendant companies "executed and delivered to the said Plaintiff a care contract", agreeing to care for the property (R. 8-9, 10, 11, 13, 14, 16). *The transactions were thus completely entered into and all agreements made and concluded by face to face personal discussions in Hidalgo*

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[2] In the case of your petitioners it is alleged that their participation consisted in the fact that they had been the former owners of the property and had a vendor's lien on the property (R. 21, 22, Par. VII, 1). This is accompanied by allegations that the vendor's lien was "fraudulent" and that by this means the petitioners were participating in "spoils and plunder." The other defendants are counsel who organized the land selling company, the secretary of the caretaking company, various brokers, and a bus driver for the land company.

[3] *E.g.*, as to four of the plaintiffs, it was alleged that they were induced by one of the broker defendants to make a trip from their homes in another part of Texas to the Rio Grande Valley (R. 23, paragraph 8).

[4] One purchaser traded some other land in Pecos, Texas, in part payment (R. 6, 7).

County, Texas, without use of the mails or any means of interstate commerce. No allegation or contention to the contrary is made.

In each case, however, it is alleged that the warranty deed to the property, although made out on the same date as the purchase contract, and the care contracts as well, were forwarded to the plaintiffs at their residences through the United States mail.

This is the sole basis of jurisdiction claimed and considered by the court below.[5] It was only "after" the oral representations complained of had been made and after the contracts had been entered into for the purchase of the land and care of the trees, that the mails were used to deliver copies of the documents previously executed (R. 18-19).

b. The Rulings Below

The District Court (Allred, J.) dismissed the complaint, stating:

> "It is clear that plaintiffs have framed their complaint with an eye to S. E. C. v. W. J. Howey Co., et al., 328 U. S. 293. In the words of counsel for defendant, Pummill: 'These residents of Texas, having read some cases and being anxious to secure Federal jurisdiction for trial of land fraud suits have plead in a manner calculated to obtain Federal jurisdiction.' Plaintiffs almost succeed in doing this; but, for reasons hereafter set out, I hold they have not." (R. 58.)

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[5] It was also alleged that as money was expended on care of the land, monthly care statements were sent through the mail (*e.g.*, R. 14-15, 18-19). The care statements are statements of monies expended for care of the property. Plaintiffs under their care contracts agreed to set up and did set up a fund in a local bank to be drawn on. After the money was expended a statement of the expenditure was mailed to the owner accompanied by a request to replenish the bank deposit in accordance with the contract (R. 47-48). The Court of Appeals made no mention of these mailings and apparently regarded them as too remote in time to have any connection with the sale of the alleged investment contract (R. 86, 87).

After holding that no sale of a security was alleged (R. 61-62), Judge Allred also ruled that the use of the mails was insufficient, since the alleged false statements were not made by use of the mails, and the only use of the mails was for delivery after sale (R. 62-67). He relied on and quoted extensively from *Kemper* v. *Lohnes*, 173 F. 2d 44 (CA 7, 1949).

On appeal, the Court of Appeals for the Fifth Circuit reversed on both points. It held that the complaint adequately alleged that a security was involved (except in the case of two of the plaintiffs who may not have executed care contracts) (R. 85-86). It also said that the use of the mails to deliver the "deeds and management contracts" was sufficient to bring the transaction within Section 12(2) of the Act (R. 86-87). The Court of Appeals stated: "We are aware of the conflict in the authorities on the subject, . . ." (R. 86), but it concluded:

> "Here the sales were apparently by oral communication, but the transactions were consummated by the use of the mails, which in our opinion brings the transaction within the statute. Delivery of the deeds and contracts is an integral part of the sale. *Schillner* v. *H. Vaughan Clarke & Co.*, 2 Cir., 134 Fed. (2) 875, 165 A. L. R. 1232 (note); *Moore* v. *Gorman*, 75 Fed. Supp. 453. Compare, *contra*, *Kemper* v. *Lohnes*, 7 Cir., 173 Fed. (2) 44, which was followed by the district court." (R. 87).

We submit that the Court of Appeals is in error in holding that it was sufficiently alleged that the transactions in question were investment contracts and thus securities within the Securities Act of 1933. In reaching its conclusion that Court read many things into the pleadings which in our opinion are not there. Such failure to require more precise pleading may create substantial prejudice in requiring petitioners to go through a trial to establish facts negating the existence of a security and of federal juris-

diction. Nevertheless, this question is basically one of construction of the pleadings and we do not believe that it is of sufficient consequence to merit the attention of this Court under its rules. We therefore confine this petition to the error of the court below in holding that use of the mails for incidental delivery of documents after sale is sufficient basis for federal jurisdiction under Section 12(2) of the Securities Act of 1933. If it should be necessary after action by this Court, we shall present to the trial court, after evidence, the question of the existence of a security.[6]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that delivery through the mails of warranty deeds and contracts previously executed was sufficient use of the mails to make the sale of the assumed security a sale "by the use of . . . the mails, by means of a prospectus or oral communication, which includes" a misrepresentation within the meaning of Section 12(2) of the Securities Act of 1933, and thus invoking the jurisdiction of the federal courts in an essentially local dispute.

2. In reversing the order of the District Court.

REASONS FOR GRANTING THE WRIT

1. Our contention here is simply that Section 12(2) of the Securities Act of 1933 does not apply because there was not sufficient use of the mails to meet the standards of that section. The decision of the court below to the contrary

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[6] For example, at trial, it would be established, among other things, that the allegation that the land was to be planted to "citrus" conceals the fact that each purchaser made his own managerial judgment, and had various percentages of grapefruit, valencia oranges and even tangerines planted on his land. These and other facts which have already been admitted on depositions, will, we believe, clearly establish that there is no basis for the allegation that a security is involved in these transactions, and that they are in fact ordinary land transactions. We trust, of course, that a ruling of this Court on the issue presented by this petition will make such a trial unnecessary.

and the decision of the Second Circuit in *Schillner* v. *H Vaughan Clarke & Co.*, 134 F. 2d 875 (1943), on which the court below relied, are directly in conflict with the decision of the Seventh Circuit in *Kemper* v. *Lohnes*, 173 F. 2d 44 (1949).

This conflict was conceded by the court below. It stated "We are aware of the conflict in the authorities on the subject, . . ." (R. 86) and it cited the *Kemper* case as "*contra*" (R. 87).

And indeed the Second Circuit in the *Schillner* case conceded that its view was in conflict with the existing authorities even before the *Kemper* case was decided. It stated (134 F. 2d at 877):

> "It must be conceded, however, that such expressions of judicial opinion as we have been able to find are not in accord with this view."

It then continued (ibid.):

> "In Gross v. Independence Shares Corp., D. C. E. D. Pa., 36 F. Supp. 541, at page 543, Judge Bard stated flatly that delivery of a security by mail after sale did not bring section 12(2) into play. Siebenthaler v. Aircraft Accessories Corp.,[2½] W. D. Mo. [1940], is to the same effect.[3]"

[2½] No opinion for publication. [Reported in CCH Fed. Sec. L. Rep. Par. 90, 122]

[3] In Murphy v. Cady, D.C. Me., 30 F. Supp. 466, 469, Judge Peters remarked parenthetically that the section 'applies only to inter-state communications.' A similar dictum may be found in Independence Shares Corp. v. Deckert, 3 Cir., 108 F. 2d 51, 54 where Judge Biggs described the statutory right as granted to one who has purchased securities 'upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce'. See also Hearings before Committee on Interstate & Foreign Commerce on H. R. 4344, etc., 77th Cong., 2d Sess. (1941), 807, where the problem was pointed out."

This case presents a clear and admitted conflict with another Circuit on the same matter, within the meaning of Rule 38 Paragraph 5(b) of this Court.

2. The question presented is of importance with relation to private litigation under the Securities Act. The many cases cited above are, we believe, representative of a substantial body of litigation involving construction of this section. These actions have occurred in a number of Circuits. See the fact that courts in the First (*Murphy* v. *Cady, supra*), Third (*Gross* v. *Independence Shares Corp.* and *Independence Shares Corp.* v. *Deckert, supra*), Seventh (*Kemper* v. *Lohnes, supra*), and Eighth (*Siebenthaler* v. *Aircraft Accessories Corp., supra*) Circuits accord with one view, and those in the Second (*Schillner* v. *H. Vaughan Clarke & Co., supra*) (see also *Moore* v. *Gorman*, 75 F. Supp. 453 (S. D. N. Y., 1948)), and Fifth (the instant case) now hold the opposite view.

3. The question does not affect government litigation or criminal prosecutions because the section involved grants only a private civil remedy. The sections under which civil or criminal suits by the Securities and Exchange Commission and the Attorney General may be brought are much more broadly phrased. See *e.g.*, Sections 5 and 17(a), 15 U. S. C. §§ 77e and 77q(a) and Judge Allred's comment (R. 63).

4. The holding below permits controversies over local real estate transactions by the residents of a single state to be brought into the federal courts by mere ingenuity. The present case emphasizes this danger. The plaintiffs purchased real estate and arranged for care by others. Such transactions are common. They may or may not be of such a character as to be properly denominated securities transactions under the decisions of this Court. Each case depends on the facts. By careful generalities in their complaints, plaintiffs may plead the existence of a security. Under the decision below they can thus establish Federal jurisdiction. For of course almost no local real estate transaction can be carried out without some incidental use of the mails to deliver the deeds after the transaction has

been completed. The result is that, under the decision of the court below, federal jurisdiction may be extended to a great many local real estate transactions.[7]

5. The Securities Act involved a great extension of federal power. It was deemed necessary because state legislation had been ineffective to protect investors against securities sellers operating beyond the confines of a particular state.[8] A comprehensive statute was enacted providing

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[7] The effect in the instant case is clear. Judge Allred referred (R. 68) to "the pressure of constant trial work for the past three months" and noted (R. 57, n. 4):

> "In five similar cases filed against the same principal defendants here, (in which jurisdiction was grounded on diversity of citizenship), practically the same allegations of conspiracy and fraud were made. After a jury trial lasting nearly four weeks, there were findings of no conspiracy and a hung jury on the issue of fraud by the selling company."

The condition of the dockets in the other federal courts needs no elaboration. See ANNUAL REPORT OF DIRECTOR OF ADMINISTRATIVE OFFICE OF THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, SEPTEMBER 1953, particularly the summary at page 1 entitled "The Still Unmet Need for More Judges."

[8] Congressional Hearings on the Securities Act of 1933 were opened by testimony of Hon. Huston Thompson who explained the need for the bill. At page 10 of the *Hearings on H. R. 4314*, March 31, 1933, he stated as follows:

> "These 'blue sky' laws of the States have failed, as is very obvious, in meeting the great problem, and that is due to a number of facts, First of all, a lack of unifomity [sic] of laws, and, second, the fact that, on the subject of extradition, those who are putting out securities can sell and send them across the State line into another State without being able to be reached so far as a criminal penalty is concerned. You only extradite and bring a man back after he has fled from a State. Well, nowadays securities can be sold from New York State over into Illinois, and the consummation of the contract can only be terminated by the consent of the seller from New York, and in that way the person in Illinois suffers if the security is not a good one; and yet the wrongful act

governmental and private remedies. Since the extent of the commerce power was not then as clear as it is now, the Act was, for constitutional reasons, based not only on the use of means or instruments of transportation in interstate commerce but also upon the use of the mails. That requirement was made disjunctive, likewise for constitutional reasons. Accordingly, although the commerce power has now been confirmed in its broadest scope, the Act in its terms applies in many instances not only to the use of interstate commerce at which it was directed, but also to intrastate uses of the mails. Where the Act is clear, the courts have of course no alternative but to apply it even to a transaction within a single state where the mails have been used. However, many provisions of the Act, including § 12(2) here involved, limit their application to a particular kind of use of interstate commerce or a particular kind of use of the mails.

Section 12(2) by its terms applies only to a sale of the security "by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes . . ." a false or misleading statement. Where it is plain that the sale was not made "by the use of" the mails or by any means or instruments of transportation in interstate commerce "by means of" a prospectus, there is no necessity in the purpose of the statute for extending its application.

Here the plaintiff Texas purchasers personally visited the site of some citrus land in the State of Texas. On these visits they purchased large blocks of that land and entered into contracts to have the land and the trees

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has been committed outside the State, and there is no way of reaching the person outside of the State."

See also *id.* at p. 99.

See also the testimony of Hon. Robert E. Healy of the Federal Trade Commission, later a Commissioner of the Securities and Exchange Commission, *Hearings on S. 875* at 214-215.

planted on it cared for. The deeds to the land were executed by the sellers and the care contract executed by the Management Company and delivered to the new owner of the land. *All this was concluded in a face-to-face transaction between Texas residents in the State of Texas in the locality where the land was located without use of any means or instrumentalities of interstate commerce or of the United States mails.* It was only *after* the transaction was concluded that at some later date the previously executed deeds to the property and the previously executed care contracts were forwarded to the plaintiffs by the United States mails.

Assuming that the sale of land and the execution of the care contract amounted to the sale of a security, how can it be said that such sale was made "by the use of . . . the mails, by means of a prospectus or oral communication, which includes" prohibited statements as required by Section 12(2)?[9] Such violence to the simple meaning of words should be applied only where Congress so intended. Cf. *United States* v. *Dickerson*, 310 U. S. 554. However, as noted above, nothing in the purposes of the Securities Act requires that its scope be extended to a controversy local in character where the local courts are fully able to grant relief.[10] It would demean the great purposes of the Securities Act to convert it into a device for dragging local controversies into the federal courts.

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[9] The Court of Appeals took the process by steps. It admitted that the "sales were apparently by oral communication" yet in the same sentence continued "but the transactions were consummated by the use of the mails" followed by the statement that "Delivery of the deeds and contracts is an integral part of the sale" (R. 87). The application of the words "consummation" and "integral" to an incidental use of the mails after the "sales" admittedly made "by oral communication" is to say the least not self-evident construction.

[10] Indeed, Section 22(a) upon which plaintiffs here base jurisdiction, contains a provision authorizing suit in the state courts and prohibiting removal of such actions to the federal courts (See Appendix).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1953.

APPENDIX

Section 22(a) of the Securities Act of 1933 (15 U. S. C. § 77v(a) reads as follows:

"Sec. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts."

Section 2(1) of the Securities Act (15 U. S. C. §77b(1)) reads as follows:

"Sec. 2. When used in this title, unless the context otherwise requires—

(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 423

LLOYD M. BENTSEN, SR., *et al.*,
Petitioners,

vs.

EMERY C. BLACKWELL, *et al.*,
Respondents.

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October, 1953

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